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Issue date: 13Nov2002

In the matter of
Larry L. Shannon
Claimant

v.

Case No. 2002 LHC 00429
OWCP No. 180787

IMC Agrico MP Inc.
Employer

and

Travelers Insurance Company
Carrier

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq., (the "Act"), and the regulations promulgated thereunder. A hearing was held on May 21, 2002 in Tampa, Florida. Larry Shannon, the Claimant, was represented by Anthony V. Cortese, Esquire, of Tampa, Florida. The Employer/Carrier is represented by William C. Cruse, Blue Williams, L.L.P., of Metarie, Louisiana. At hearing, nine (9) administrative law judge exhibits, marked as ALJ 1-9, were admitted into evidence. The Claimant offered twelve (12) exhibits (hereinafter referred to as "CX" 1-8 and 11-14), and the Employer/Carrier offered nineteen (19) exhibits (hereinafter "EX" 1-19). All of these were entered into evidence. The Claimant, a former co-worker, Timothy Eustice, his son, Michael Shannon, and his wife, Lila Shannon, all testified at hearing. After the receipt of the Hearing Transcript, both parties filed briefs.

The following stipulations were agreed upon by the parties:

1. The Longshore and Harbor Workers' Compensation Act applies to this claim.
2. Jurisdiction is proper.
3. Mr. Shannon, Claimant, and IMC Agrico MP Inc., were in an employee/employer relationship at the time of the September 28, 1999 accident.
4. The accident arose in the course and scope of the employment.
5. Claimant's last day of work was September 28, 1999.
6. Claimant's claim was timely filed.
7. Mr. Shannon has been paid temporary total disability benefits since the date of the accident.
8. The average weekly wage is $817.25.
9. The Claimant has been accepted as permanently and totally disabled, with a maximum medical improvement date of June 5, 2001.
10. Claimant's present authorized treating physicians are Dr. Kabaria (pain management) and Dr. DeVine (psychiatrist). The following are treating physicians who are not authorized: Dr. Martinez; Kristen Seidel Dennick (mental health therapist); Dr. Rosemurgy; and Dr. Jenkins.

Section 7

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §§ 907(a).

Issues

The parties are in agreement that this case is limited to a single issue, the extent of medical benefits the Claimant may be entitled under Section 7 of the Act. However, the Claimant argues that the cause of his ambulation problems should not be at issue (Tr. 12). On the other hand, the Employer/Carrier contends that Claimant's problems with ambulation are not causally related to the work-related accident and injuries sustained therein, and are, therefore, at issue (ALJ 7). Because some of Claimant's demands relate to his ambulation problems, the aforementioned causal relationship will be discussed herein. However, I find the issues to be those listed in Claimant's Pre-hearing Report, which essentially are those recommendations made in the Rothman Report (ALJ 1). Therefore, the following is the sole issue of determination:

1. Whether the Claimant's need for a jazzy scooter and other apparatus[1] contained in the Rothman report are reasonable, necessary and causally related to the September 28, 1999 work injuries.

Facts

According to the testimony, the stipulations of the parties and the medical histories supplied by the Claimant, Mr. Shannon was assisting his supervisor, Calvin Ogletree, with a product inventory of the Port Sutton granular warehouses. After checking Building Number 1at Port Sutton, the supervisor drove a golf cart, with the Claimant as his passenger, onto Truck Unloading Ramp Number 1 to speak with a Chemical Conveyorman at that site. On the top of the ramp, Mr. Ogletree disengaged the golf transmission and it instantly started rolling backwards down the ramp. Mr. Ogletree attempted to steer the golf cart away from a drainage ditch and the cart made

[1] The Claimant, in his Pre-hearing Statement, listed the following as apparatus that are reasonable, necessary and causally related to his work-related injuries: Neuropsychological treatment; speech therapy; Jazzy 1120 scooter; van modification with lift chair and club chair; home modification, including, but not limited to ramps, paved driveway, bathroom modifications; electric queen-sized bed; widened doorways; aides for independent living; attendant care; YMCA membership; walker; lift chair; home computer; permanent total disability; cost of living adjustments since partial total disability; smoke and fire alarms; care with a psychiatrist; evaluation by occupational therapist; physical therapy; communication therapy; dietary assessment; hearing test; back brace; abdominal binder; and wrist splints (ALJ 1).

a sweeping turn striking a structural steel beam.[2] The impact of the collision by the cart to a cross bracing member forced the canopy of the cart to fold down into the passenger seat area. As a result, Mr. Shannon was struck by the cross brace and canopy (CX 4).

Recognizing that Mr. Shannon was unconscious and injured, Mr Ogletree went to the Main Office and called 911 and requested help. The Conveyorman called the Ammonia Supervisor, Ron Lewis, who upon arrival, evaluated Mr. Shannon's injuries and began first aid. The Hillsborough County Fire and EMS arrived about ten (10) minutes after the call. Mr. Shannon was treated and thereafter transported to Tampa General Hospital where he was evaluated, treated and released to the IMC-Agrico physician (Id.).

The Emergency Room Report from Tampa General Hospital provides that Claimant had a positive loss of consciousness, was groggy and had trouble with memory, and had difficulty recognizing people (EX 10). Claimant complained of right shoulder pain as well as hip and neck pain, but no headache (Id.). The Claimant underwent a CT scan, a cervical neck series Group II and an AP of the pelvis to the head, which all were negative (Id.). Claimant was given a prescription for Motrin and Percocet and told to follow-up in one (1) to two (2) weeks, or return to the emergency room for worsening symptoms or loss of consciousness (Id.). For the several days after the accident, the Claimant was seen by Dr. Kathleen Jenkins wherein Mr. Shannon was diagnosed with multiple contusions and a cervical sprain (CX 7, EX 17). Dr. Jenkins continued to treat Claimant until October 28, 1999 whereby she prescribed physical therapy sessions and referred Claimant to treat with an orthopedic specialist (EX 17).

On October 5, 1999, Claimant began treating with Peter Jacobson, M.D. (EX 13), his primary physician. Included in the record are Dr. Jacobson's progress notes arising out of his medical evaluations of the Claimant (Id.). However, the vast majority of these notes are either illegible or uncomprehensible for a layperson. As such, I have been able to decipher the following medical diagnoses made by Dr. Jacobson:

- February 23, 2000: Claimant suffers from: (1) right-sided pain under the rib cage; (2) nervousness; and (3) sinus. Dr. Jacobson also made note of panic attacks;
- March 9, 2000: Claimant suffers from a hernia.
- March 21, 2000: Claimant feels fair, but still hurts on the right side. Mr. Shannon had a CT scan which showed a tear.

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[2] The Employer identified the incident's Causal Factors as:

1. The supervisor was operating a vehicle with known defects in the brake and steering systems.
2. The vehicle was not Tagged Out when deficiencies were found.
3. Golf carts are not included in the Daily Inspection program.
4. At the time of the accident, the ramp surface was clean and dry.

(CX 4).

- April 20, 2000: Claimant reports right leg pain and weakness.
- December 19, 2000: Claimant requested referral to pain management; need prescription.
- March 21, 2001: Claimant can't hardly walk on right leg.

(Id.). Lastly, Dr. Jacobson, on February 20, 2002, prescribed that Mr. Shannon cannot do a deposition for longer than one (1) hour due to his condition (Id.).

In the month or so that followed the September 28, 1999 accident, the Claimant underwent a series of physical therapy sessions at Sports and Orthopedic Rehabilitation Services (EX 10). The primary diagnosis was a cervical strain, with a thoracic strain as the secondary diagnosis (Id.). Furthermore, it was reported that Claimant showed improvement by November 10, 1999 (Id.).

At the same time, Claimant was treating with various physicians for his work-related injuries. Anthony Infante, D.O., of Florida Orthopaedic Institute, saw the Claimant on numerous occasions. Dr. Infante's initial impression was that Claimant suffered a cervical and thoracic sprain (EX 9). An MRI was recommended which revealed no disc herniation or stenosis, but degenerative disease throughout (Id.). Claimant complained of painful muscles spasms in his cervical spine (Id.). Dr. Infante stated to the Claimant that he suffered from muscle strains which would get better in time, which included physical therapy and a TENS unit (Id.). During his February 8, 2000 visit with Claimant, Dr. Infante noted that Claimant has a significant problem with cervical strain, lumbar strain and a thoracic strain (Id.). Dr. Infante further noted that, if someone picked up the Claimant, he could return to work with his only restrictions being a maximum lifting of twenty (20) pounds and no climbing (Id.). Claimant did not treat with Dr. Infante again until June 29, 2000 (EX 9). At that time, Dr. Infante concluded that he found nothing objective causing Claimant's problems and released him to drive and return to work with restrictions (Id.). At the request of Dr. Infante, Claimant underwent an MRI of the cervical spine and lumbar spine and a complete myelogram of the spine canal on July 19, 2000 (Id.). These tests revealed early, multilevel degenerative disease, with no evidence for disc herniation or spinal stenosis (cervical/lumbar spine MRI); and mild intervertebral disc space degenerative Schmorl's node changes with mild diffuse annular disc bulge, but no overall central spinal canal stenosis or neural foraminal narrowing (myelogram) (Id.).

Claimant also treated with Drs. Small and Frankle while under the care of Florida Orthopaedic Institute. Mr. Shannon was first examined by John Small, M.D. on February 29, 2000 (EX 9). At that time, Claimant complained of pain in his neck, upper back, right leg and right arm, along with headaches and numbness in the left hand (Id.). Dr. Small diagnosed Claimant with cervical sprains and strains, thoracic sprains and strains and cervical spondylosis with myelopathy (Id.). Additionally, Dr. Small recommended that Claimant was capable of doing light-duty work on a part-time basis with restrictions (Id.). Claimant next saw Dr. Small on June 5, 2000 wherein it was concluded that Claimant suffered from cervical spondylosis without myelopathy, lumbosacral spondylosis without myelopathy and thoracic sprains and strains (Id.). Mark Frankle, M.D., an orthopedic surgeon, first met with Mr. Shannon on May 16, 2000 (Id.). Dr. Frankle diagnosed

Claimant's shoulder and neck discomfort as left shoulder pain, probably cervical in origin (Id.). Claimant was given an injection of Celestone and Marcaine, to which there was no relief (Id.). On July 18, 2000, Claimant had a follow-up for the left shoulder pain with Dr. Frankle (Id.). At that time, Mr. Shannon continued to experience pain in his left shoulder (Id.). Moreover, Claimant also expressed that he was having suicidal ideations (Id.). Claimant was diagnosed with right shoulder pain, but it was explained to him that there was nothing wrong intrinsically with his shoulder as far as muscle tendon or ligaments (Id.). As for returning to work, Dr. Frankle felt that Mr. Shannon was not a candidate for work until his suicidal tendencies are addressed (Id.).

During the time he treated with Florida Orthopaedic Institute, Claimant received a second opinion from Larry Fishman, M.D., a neurologist (EX 10). Dr. Fishman concluded that Claimant had a nonfocal examination and would consider surgery, if indicated (Id.). Dr. Fishman recommended that Claimant undergo a myleogram/CT scan, which took place on January 13, 2000 under the care of Andrew Messina, M.D. (Id.). Dr. Messina found no significant overall spinal canal stenosis or neuroforaminal narrowing, but did note that there was mild intervertebral disc space and degenerative Schmorl's nodes (Id.).

In addition to the foregoing treatment, Claimant treated with Robert Martinez, M.D., a neurologist. Dr. Martinez, a board certified neurologist, first examined Mr. Shannon on January 10, 2000 and thereafter treated him on numerous occasions (CX 3). At that time, the Claimant complained of headaches, memory loss and confusion, neck and low back pain, trembling of both hands, numbness of his left hand, and insomnia (Id.). The results of his physical exam of Claimant produced the following results: Adson's test for thoracic outlet syndrome was negative bilaterally; negative for carpal tunnel syndrome; vascular exam unremarkable; no atrophy, fasciculation or evidence of reflex sympathetic dystrophy; tenderness over the C4-C5-C6 vertebrae; nodular muscle spasm in the trapezius muscle mass areas and superior lateral cervical paraspinous muscle mass areas; restricted mobility of the cervical spine; tenderness, swelling, muscle spasm in upper thoracic spine; and tenderness, swelling, and muscles spasm in the lumbar spine (Id.). Dr. Martinez's neurological impression includes: cerebral concussion with post-concussive syndrome can be ruled out; chronic cervical, thoracic and lumbosacral strain with degenerative arthritis; and insomnia secondary to severe pain (Id.). Dr. Martinez made numerous recommendations, some of which include: MRI scan of brain; EEG to evaluate for cerebral concussion; continued medications for muscle relaxation and anti-inflammatory pain relief; TENS unit for pain control; home therapy; periodic massage and physical therapy; no jumping or bouncing exercises; may do walking and aqua therapy; avoid heavy lifting, bending and straining – shouldn't lift more than 20 pounds from a bent position, 10 pounds repetitively – do not keep the neck or back bent in a fixed position for greater than 30 minutes without being able to move it and do not work in a cold, confined environment; and do not drive (Id.). Dr. Martinez concluded in his report by stating that Claimant's symptoms – concussion, cervical, thoracic strain and insomnia – are a direct result of the September 28, 1999 injury (Id.).

Dr. Martinez next examined Claimant on February 7, 2000 (CX 3). For the most part, Claimant

presented the same complaints and Dr. Martinez offered the same recommendations and impressions; however, Mr. Shannon presented complaints of anxiety and depression and Dr. Martinez diagnosed Claimant with a cerebral concussion with post-concussive symptoms and recommended him to see a psychiatrist for his complaints (Id.). Dr. Martinez did note that the EEG he performed was unremarkable (Id.). Claimant's next treatment with Dr. Martinez took place on March 8, 2000 (Id.). Mr. Shannon's complaints and Dr. Martinez's diagnosis were both unchanged; however, it was recommended that Claimant see a neuropsychologist (Id.). Dr. Martinez next treated Claimant on July 11, 2000, wherein it was reported that his EEG and CAT scan of the brain were both normal (Id.). Other than these notations, Dr. Martinez's report remained unchanged from his previous visit with Claimant (Id.). Claimant did not treat again with Dr. Martinez until April 9, 2002 (Id.). In his report, Dr. Martinez notes that he reviewed Phyllis Rothman's recommendations and agreed with all of them, and added that they are medically necessary for the reasons set forth in that report (Id.). Otherwise, Dr. Martinez's report remained unchanged from his previous visit with Claimant (Id.).

At his deposition, Dr. Martinez testified that Claimant reached maximum medical improvement by April 9, 2002 (CX 3). Dr. Martinez further testified that he ruled out focal brain damage following Claimant's July 11, 2000 EEG, but found Claimant to have a degenerative disc disease in the lumbar spine following a July 19, 2000 MRI (Id.). Dr. Martinez also testified that he stopped seeing Mr. Shannon in July, 2000 because "he hadn't really changed,[3] nothing I could do to cure problem; however, Claimant should continue psychiatric treatment and home therapy" (Id.). Dr. Martinez also believed that, at that time, Claimant was totally disabled and unable to work (Id.).

At the recommendation of Dr. Martinez, Claimant sought psychiatric evaluation and treatment with Charles DeVine, M.D. on May 17, 2000 (CX 6). At that time, Claimant presented serious panic-type symptoms, shortness of breath, palpitations, chest pain, feeling of impending doom, the shakes and tremulousness (Id.). After his psychiatric evaluation of Mr. Shannon, Dr. DeVine concluded that Mr. Shannon suffered from a moderate to severe case of panic disorder without agoraphobia[4] secondary to his traumatizing event on September 28, 1999 (EX 6). Dr. DeVine further opined that Claimant did not suffer from post-traumatic stress disorder; however, he has undergone a complete personality change due to his inability to control symptoms (Id.). Dr. DeVine's progress notes from June and July of 2000 provide that Claimant had moderate mood improvement and a decrease in panic attacks with medication (Id.). Dr. DeVine's progress notes from August through December of 2000 provide that Claimant was irritable and his frustration was secondary to his unsuccessful rib surgery (Id.). During his February 14, 2001 visit with Mr.

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[3] Dr. Martinez also stated that Mr. Shannon's condition remained the same; he could walk in and out of the visits (CX 3).

[4] Dr. DeVine explained in his deposition that Claimant's panic disorder without agoraphobia meant that he could still leave his home – he wasn't homebound by the panic attacks (CX 6).

Shannon, Dr. DeVine felt that Claimant's mood was less depressed overall, but his self-esteem was very low because of current physical limitations (Id.). Lastly, it was recommended that Claimant undergo neuropsychological testing to clarify diagnosis and the extent of possible brain injury (Id.). Dr. DeVine's March and April, 2001 progress notes provide that Claimant has developed more anxiety-related tremulousness and has had shaking legs a lot in his sleep (Id.). Dr. DeVine reported in his progress notes from Claimant's May through July evaluations that Mr. Shannon had moderate improvement in his mood and anxiety level, and he is able to better tolerate rides in the car (Id.). However, Dr. DeVine reported in his July notes that Claimant had a panic attack during a trip to Ohio while in the car (Id.). Thereafter, he opined that Claimant is completely disabled (Id.). Claimant's progress notes from August and September 10, 2001 visits provide that he has difficulty concentrating, lacks motivation, is depressed, and is easily distracted (Id.). Dr. DeVine reported anxiousness and insomnia in his September 27, 2001, as well as in his October and November, 2001 progress notes (Id.). From Claimant's January through March, 2002 psychiatric visits, Dr. DeVine reported that Mr. Shannon was having tremors and difficulty with ambulation, was frustrated due to his medical concerns and his mood was down as he faced vascular surgery (Id.). Dr. DeVine's final progress notes arise out of his April 29, 2002 visit with the Claimant, wherein Mr. Shannon expressed frustration due to his difficulty with locomotion due to chronic pain (Id.). Dr. DeVine reported that Claimant's mood was anxious, he suffered four (4) to (5) panic attacks and had low self-esteem (Id.). Dr. DeVine concluded that Mr. Shannon's current symptoms are the result of his difficulty ambulating and chronic pain as a result of his work-related injuries (Id.).

In addition to Dr. DeVine's progress notes, Dr. DeVine, on August 13, 2001, prescribed a Jazzy 1120 Power Chair for Mr. Shannon (CX 13). In his deposition, Dr. DeVine testified that the prescription for the Jazzy Scooter was both medically and psychiatrically necessary for the Claimant because it enables people who are debilitated in their mobility to become more mobile (CX 1). Dr. DeVine further testified that Mr. Shannon is in need of the scooter "for ambulation purposes – (currently) he can travel only very small distances without the use of this apparatus" (Id.). According to Dr. DeVine, Claimant is very limited in his activity – use of a cane – as a result of the pain (Id.). This pain, according to Dr. DeVine, affects Mr. Shannon's psychiatric condition in that it affects his self-esteem adversely, which exacerbates both the anxiety and mood disorder (Id.). Dr. DeVine further testified that Claimant's psychiatric conditions – panic disorder without agoraphobia and major depression, recurrent and moderate in its intensity – are causally related to his work injury (Id.). When questioned about the recommendations made in the Rothman Report, Dr. DeVine stated that he agreed with all of the recommendations made by Ms. Rothman (Id.).

During his second deposition, dated April 9, 2002, Dr. DeVine testified that Claimant reached maximum medical improvement roughly one (1) year earlier, in May of 2001, and is totally disabled from a psychiatric standpoint (CX 2). However, Dr. DeVine testified that Claimant's panic and depression symptoms have improved between the period of August, 2000 and March 28, 2002, but not to the point where he's completely resolved (Id.). Dr. DeVine also testified that Claimant is completely disabled (psychiatrically) to a point where he could not perform any type

of employment (Id.). Dr. DeVine added that any work would cause his symptoms to worsen because Claimant is psychiatrically, very much in a fragile state, and any job-related stress would negatively affect his psychiatric symptoms (Id.). Moreover, Dr. DeVine believes that Mr. Shannon should continue treating with a psychotherapist in order to provide him support for his self-esteem (Id.). Rehashing the recommendations made in the Rothman Report, Dr. DeVine testified that they are reasonable and necessary because of Claimant's psychiatric and physical problems (Id.).

Due to Claimant's increased abdominal pain, Claimant sought treatment with Alex Rosemurgy, M.D., a surgeon at Tampa General Hospital. Mr. Shannon first met with Dr. Rosemurgy on June 15, 2000 wherein Claimant was diagnosed with an associated hernia and recommended to lose weight (CX 8, EX 11). Dr. Rosemurgy saw Claimant approximately a month later and according to Dr. Rosemurgy, Mr. Shannon lost weight which allowed them to prepare to repair Claimant's hernia (Id.). In his August 25, 2000 visit, Dr. Rosemurgy scheduled Claimant for a diaphragmatic hernia surgery the following week (Id.). Dr. Rosemurgy performed a diaphragmatic laparoscopy on September 5, 2000 (EX 5). Dr. Rosemurgy's post-operative diagnosis included an abnormal configuration of the diaphragm and abdominal wall as a consequence of all the rib fractures, but no diaphragmatic hernia (Id.).

At the request of the workers' compensation insurance carrier, Claimant underwent an independent medical evaluation on August 21, 2000 (EX 10). Thomas M. Newman, M.D., a neurologist who performed the IME, reported that Mr. Shannon presented complaints of headaches, loss of memory, neck pain and lower back pain (Id.). Dr. Newman offered the impression that Claimant suffers from a S/P closed head injury with residual headaches and degenerative cervical and lumbar spine disease (Id.). Dr. Newman noted that Mr. Shannon's degenerative changes were pre-existing to which it is possible that the trauma aggravated his pre-existing symptoms (Id.). It was further noted that Claimant's psychiatric problems – depression and panic disorder – could be pre-existing, but Dr. Newman stated that he would defer to a psychiatrist for such a determination. However, Dr. Newman did conclude that while Mr. Shannon's psychiatric problems are a direct factor from his head trauma, they may only be a psychological reaction to his injury. From a neurological standpoint, Dr. Newman concluded that Claimant suffers from no objective abnormalities of injury (Id.).

On August 29, 2000, Claimant underwent a psychiatric evaluation with John R. Delaney, M.D., P.A. (CX 14, EX 7). In a review of Mr. Shannon's medical history, it is noted that Claimant has had severe heart disease since 1990, and has difficulty with blocked arteries, requiring five (5) angioplasties since such time (Id.). During his review of emotional problems, Dr. Delaney noted that Claimant has brooded a good deal about comments made by evaluating physicians,[5] to the

[5] Mr. Shannon told Dr. Delaney that he was quite upset with several of the doctors and states that Dr. Infante told him that he felt the origin of his physical symptoms were "from the neck up" (CX 9, EX 7) Additionally, Claimant was told by a neurologist that he should "go back to work and mow his lawn" (Id.).

point where, at one point, he sat up at night and had homicidal thoughts about how he would kill Dr. Infante and talked about fantasies about killing the doctor with a bullet made of ice or some type of knife (Id.). Mr. Shannon also stated that, prior to being prescribed Zoloft, he had some thoughts about suicide, using one of the guns he has at home (Id.). Dr. Delaney diagnosed Claimant as having: panic disorder with agoraphobia; depression secondary to pain syndrome; post-concussional syndrome (mild) by history; and personality disorder, including passive aggressive, somatization and hysterical features (Id.). In his conclusion, Dr. Delaney noted that Dr. DeVine's treatment appeared to be appropriate (Id.). Dr. Delaney could not determine the origin of some of his pain, as it is related to his broken ribs, since it is not detailed in any records that were forwarded to him (Id.). Dr. Delaney opined that Mr. Shannon's panic symptoms and depression are related to his injury; and furthermore, that there is some evidence of a post-concussional syndrome which, although mild, may be causing some of his psychiatric symptoms (Id.). Dr. Delaney recommended Claimant to have neuropsychological testing by Dr. DeVine in order to help clarify which of the symptoms are caused by a post-concussional syndrome and which are part of his own personality (Id.). From a psychological point of view, Dr. Delaney pointed out that Claimant cannot drive; however, it would be helpful to encourage him to gradually resume driving once his panic has subsided somewhat (Id.).

On January 29, 2001, Claimant underwent a consultation with Vipul V. Kabaria, M.D., P.A. for evaluation and management of pain in his neck, right arm, right chest wall, right hip and right leg (EX 16). Following a review of Mr. Shannon's medical history and a physical examination of Claimant, Dr. Kabaria offered the following impressions: neck pain; right upper extremity pain; cervical spondylosis; low back pain; and lumbar disc disease (Id.). Dr. Kabaria later testified that these symptoms are related to the accident (CX 4). As a result, Dr. Kabaria recommended that Claimant undergo a trial of cervical epidural steroid injections with myleographic confirmation, fluoroscopic guidance and IV sedation (EX 16). It was also recommended that Claimant undergo hydrotherapy which is essentially exercises in a swimming pool (CX 4). Lastly, Dr. Kabaria concluded that Mr. Shannon could return to work in light duty capacity, with restrictions (Id.). Thereafter and up until November 28, 2001, Claimant was given cervical epidural steroid injections on a monthly basis (Id.). Following each monthly procedure, Dr. Kabaria reported cervical radiculopathy and cervical disc disease in his post-operative diagnosis (Id.)

In addition to treatment of Mr. Shannon, Dr. Kabaria testified in a deposition as to the Claimant's condition. When asked about his January 29, 2001 examination of the Claimant, Dr. Kabaria stated that Mr. Shannon's test for sciatica or radiculopathy in the lumbar spine was negative (CX 4). However, Dr. Kabaria stated that it can be radicular in nature based on the findings of the annular bulge at L4–5 as noted on the CT/myelogram – or it can be referred pain from any other source in the spine (Id.) Additionally, Dr. Kabaria testified that Claimant's motor, sensory and reflex function were normal and intact, as well as his coordination (Id.). As a result, Dr. Kabaria testified that he didn't think Mr. Shannon needed any assistance in ambulating at that time (Id.). At Claimant's June 5, 2001 examination, Dr. Kabaria again noted that there was neither sciatica, nor radiculopathy in the lumbar spine (EX 16). However, it was noted that Claimant complained of weakness in the legs which caused him to fall (Id.).

Dr. Kabaria testified that he endorsed Dr. DeVine's prescription for the Jazzy Scooter because he had been treating the Claimant for his pain symptomatology and spine pathology (Id.). Dr. Kabaria went on to testify that "whether it (scooter) is actually related to the injury and the need of that, I've signed it with thought process that, yes, I've been treating for this symptomatology, another physician has already said that, and I go along with another physician's recommendation. I've not put forward any – when I signed the prescription, I did not put forward any thought process of causal relationship at that time " (Id.). Dr. Kabaria later testified that Claimant's need for the scooter is causally related to his work injury as a result of the degenerative conditions in his leg and back (lumbar disc) (Id.). Lastly, Dr. Kabaria testified that he would defer to the Rothman Report for the equipment needed in Claimant's home (Id.).

On July 18, 2001, Mr. Shannon began psychotherapy treatment with Kristen Seidel-Denick, a mental health counselor (EX 14). During this visit, Claimant complained of rectal bleeding, low physical endurance and chronic pain (Id.). Ms. Seidel-Denick's impression was that Claimant feels beaten, has increased control issues and needs to continue to use pain strategies and anxiety decreasing strategies (Id.). At that time, Ms. Seidel-Denick's objective was to enable Mr. Shannon to consistently use coping skills (Id.). During the August 2, 2001 visit, Ms. Seidel-Denick noted that Claimant spoke more freely, but was worried about the notion of going back to work (Id.). Mr. Shannon complained of panic attacks and stress (Id.). The objective, at this point, was to address Claimant's coping skills (Id.). Claimant met with Ms. Seidel-Denick a week later (August 9, 2001) and stated that he had a panic attack on the way over there. Ms. Seidel-Denick's impression was one of anger and grief. Her objective was to have Mr. Shannon get anger out appropriately, grieve losses and get involved with something positive (Id.). Claimant did not meet with Ms. Seidel-Denick until November 8, 2001 wherein he described himself as a "walking deadman" and hoped things would end (Id.). Ms. Seidel-Denick's impression was that Mr. Shannon was lost and angry at the system which fueled his depression (Id.). Her objective was again to have the Claimant rechannel his anger (Id.). Claimant's last visit with Kristen Seidel-Denick took place on November 15, 2001, wherein he described himself as "short-tempered and on the defensive" (Id.). Mr. Shannon also stated that he is agitated and had been causing conflicts with his family, but did say that he got a guinea pig as something positive to focus on (Id.). Ms. Seidel-Denick's impression was that Claimant was better able to channel his previous skills in present situation into positive thinking; his anger was decreased since he had started painting and taking care of his pet; and his anxiety had started to decrease (Id.).

On October 5, 2001, the Claimant underwent an Assessment Interview and History with Phyllis Rothman, RN, BS, CCM, CDMS, CLCP (CX 5). Mr. Shannon presented complaints of limited range of motion and continued pain in his neck and shoulder; pain in the mid-upper back region, on the right side under his shoulder blade; weakness and a burning sensation down his right leg; weak hands, with limited strength; panic attacks which are tearful at times; continued headaches; tremors in both hands; and difficulty sleeping at night (Id.). Claimant's secondary problems include difficulty getting in and out of chairs, only able to walk short distances and suffers with incontinence in the mornings (Id.). Ms. Rothman's report also includes a review of Mr. Shannon's past and present medical histories, his daily and social activities and habits and a review

of his personal and family background (Id.). Based on her interview and assessment of Mr. Shannon's physical and psychiatric problems, Ms. Rothman made the following recommendations to better assist Claimant's living condition:

1. Wheelchair Needs: Jazzy 1120, as recommended by the Claimant's treating physician, to allow him to be more mobile. This would also include a lift for his present van, a driveway and ramps from the home to the driveway (both front and back entrances), and a cement walkway around the house to the driveway and down to the street for emergency purposes. Claimant's van would have to be modified to accommodate the wheelchair and possibly a club chair could be installed for transferring.
2. Architectural Renovations: Because Claimant's home is not wheelchair accessible, the doors of the bedroom and bathroom should be widened, so that if he needed to access them by wheelchair it would be possible. Floor coverings would make it easier for the wheelchair get around.
3. Independent Living Needs: The Claimant would benefit from the following independent living aides: a reacher, adaptive utensils and plates for eating, a jar opener, shoe and sock aides, glass aide, clipboard, hand held shower head, long-handled shoe horn, adaptive clothing, and hand support guards for the bathroom in the toilet and shower areas. Because there is a tub/shower, the Claimant would be more independent if there was a walk-in shower and shower bench with back. The toilet needs a raised toilet seat.
4. Facility Costs: It would be most appropriate for the Claimant to have a short stay inpatient rehabilitation evaluation to determine his present and future functional needs and prepare a program that would maintain his strength and keep him as strong and independent as possible. One of the recommendations from a rehabilitation evaluation standpoint might include a home program and a facility membership to a local YMCA for swimming and an exercise program.
5. Future Medical Care: It is very important for the Claimant to have a neuropsychological evaluation to determine his present status and losses. Once this is completed, therapy could be directed towards goals in regaining some of his cognitive losses and retraining to keep the Claimant as independent as possible.
6. Home Attendant Care: The Claimant needs assistance with his daily care, meal preparation and grooming. It would be helpful for the Claimant to have a Home Health Assistant for two (2) hours daily to help with some of his care and take the burden off his wife. Claimant is a large man and it is difficult for him to get up out of bed and get going in the morning, as he is stiff and needs assistance.
7. Orthopedic DME: The Claimant has a cane and would also benefit from a walker for longer distances.
8. Home Furnishings: The Claimant would benefit from a lift chair, as it is very difficult for him to get up and out of a chair. He would also benefit from a full electric hospital bed, queen size, as his wife presently has to get him up out of bed in the morning. The electronic bed would allow Claimant to be more independent

– he would be able to get up and go to the bathroom himself, instead of waiting for his wife to get him up.

9. Safety Issues: There should be a smoke and fire alarm in the home, as the client is alone most of the time, which can be hooked up to a monitoring service that would call for help and allow him time to get out of the home safely.
10. Educational Needs: It would also be helpful for the Claimant to have a computer. This would allow him to have activities that would be most beneficial in helping with his cognitive issues. It would also allow him some activity during the days when he is home alone. Claimant could communicate with people outside of his wife and children, and he would be using his skills to enhance his memory and thought process.
11. Present Treatment: The Claimant is presently being treated by a pain management specialist, a psychiatrist and a mental health counselor. He should also have routine care with a physiatrist to assess his functional status and medication levels and prescribe for his future needs.
12. Evaluations: These should include: occupational therapy, physical therapy, communication therapy, inpatient/outpatient evaluation for rehabilitation, nursing needs, dietary assessment, education evaluation, hearing test, and speech therapy evaluation.
13. Modalities: These should include: individual counseling, family/marital counseling, speech therapy, occupational and physical therapy, support group meetings, and YMCA membership.
14. Orthotic Needs: The Claimant might benefit from a back brace, abdominal binder, and wrist splints for support and comfort.

(CX 5).

On November 5, 2001, the Claimant underwent a psychological evaluation with Peter Kaplan, Ph.D. (EX 8). After reviewing Mr. Shannon's past and present medical histories, Dr. Kaplan made note of Claimant's behaviors which included: slow and awkward gait; no assistive devices; a resting, bilateral upper extremity tremor was noted; no unusual motor activity; minimal pain behaviors; unusual speech with a somewhat variable stutter; thought process was mildly slowed and concrete; a degree of psychomotor agitation and general anxiousness; a variable mood, ranging from sad to angry without much apparent control over his emotional behavior (Id.). Based on the foregoing, Dr. Kaplan concluded that the Claimant shows a catastrophic psychiatric reaction to his injury, in that his complaints and behaviors are not consistent with his identifiable pathology (Id.). Dr. Kaplan further concluded that Claimant's stated understanding of his injury, of anatomy, and pathology were inadequate and distorted, which may reflect Mr. Shannon's significant lack of education or a lack of intellectual ability (Id.). Dr. Kaplan diagnosed Claimant as having major depression, recurrent; however, it appears to be temporally related to the accident, as Mr. Shannon has no prior history of similar behavior (Id.). Based on the circumstances surrounding Claimant, Dr. Kaplan stated that the prognosis for a recovery is extremely poor for Mr. Shannon (Id.). As for the prescription for a neuropsychological evaluation, Dr. Kaplan is under the belief that, given the facts of the accident, the likelihood of a

significant traumatic head injury is slim (Id.). Therefore, Dr. Kaplan believes that a comprehensive neuropsychological evaluation will quantify the nature of Claimant's psychiatric illness (Id.). Dr. Kaplan does not anticipate that Mr. Shannon will ever return to work, given his multiple complaints, his severely impaired presentation, and his likely lack of financial incentive – given the acceptance into Social Security Disability (Id.). Lastly, Dr. Kaplan is under the impression that Claimant's psychiatric symptoms could be modified with aggressive psychotropic medication and intensive regular psychotherapy (Id.).

On December 12, 2001, the Claimant presented to Brandon Regional Hospital with diffuse burning of his chest which continued to recur during his stay there (EX 3). Thereafter, Mr. Shannon was airlifted to Tampa General Hospital where he underwent cardiac catheterization followed by stenting times two (2) of his right coronary artery (Id.). The cardiac catheterization also revealed total occlusion of his right iliac artery and high grade stenosis of his left iliac artery (Id.). In his January 4, 2002 consultation with Ravi Khant, M.D., FACC, Mr. Shannon was diagnosed as having coronary artery disease, chronic obstructive disease/emphysema, hypertension, a history of panic attacks, chronic back pain, hyperlipidemia and obesity (Id.). Lastly, it was recommended that Claimant was to undergo aorta Phen-Fen bypass surgery (Id.).

Claimant treated with Arthur Graves, M.D., a pulmonologist, on January 9, 2002 (EX 18). Following a review of Mr. Shannon's present and past medical history, his social and family history, and a physical examination, Dr. Graves offered the following impression: chronic obstructive pulmonary dysfunction, likely moderate to severe in nature by clinical exam; chronic hypoxemia; coronary artery disease; probable obstructive sleep apnea given snoring, witnessed apnea and severe hypersomnolence; peripheral vascular disease in the right lower extremity; hypertension; and anxiety and depression (Id.).

At the referral of Dr. Jacobson, Claimant was sent for an evaluation of peripheral vascular disease to be made by Husain Nagamia, M.D. (EX 4). During the February 27, 2002 visit, Dr. Nagamia reviewed Mr. Shannon's, at that time, current complaints, his past surgical and medical histories, and performed a physical examination (Id.). Dr. Nagamia's diagnostic impression was that Claimant suffered from peripheral vascular disease, with suspected occlusion of the right iliac artery with distal reconstitution; status post-stenting for coronary artery disease; a history of myocardial infarctions; chronic obstructive pulmonary disease (on corticosteroid therapy); obesity; and past tobacco over-utilization (Id.). Dr. Nagamia recommended that Mr. Shannon have an aortogram with run-off to determine the extent of his peripheral vascular disease in the lower extremity (Id.). Following his evaluation of Claimant for vascular disease of the lower extremities on May 1, 2002, Dr. Nagamia concluded that Mr. Shannon has complete occlusion of his right iliac artery, along with a history of thoracic injury and Parkinsonism (Id.). However, it was noted that Claimant wished to postpone surgery until after his court date in the end of May (Id.).

In addition to the medical records, Dr. Nagamia offered deposition testimony on May 9, 2002 (EX 2). Therein, Dr. Nagamia testified that he had been treating Mr. Shannon in terms of his

vascular problems which include peripheral vascular disease (Id.). Dr. Nagamia described peripheral vascular disease as causing blockages in the arteries, the right iliac artery in the Claimant's instance (Id.). In Mr. Shannon's case, Dr. Nagamia classified him as having chronic blockage (plaque) which causes claudication or pain while walking or exercise (Id.). Dr. Nagamia added that if the blockage continues to advance, the patient starts developing rest pain, which Claimant also suffers from (Id.). As for the accumulation of plaque and blockage, Dr. Nagamia named the following as Claimant's risk factors: tobacco use, obesity, genetic tendency with prior myocardial infarcation, high cholesterol diet, a lack of exercise and stress (Id.). Moreover, Dr. Nagamia offered that a person who has prior blockage in their heart and arteries would typically have blockage in other arteries – as can be seen with Mr. Shannon who presented a history of heart attacks and blockage in the blood vessels to the heart[6] (Id.). Based on the foregoing and his February 27, 2002 evaluation of Claimant, Dr. Nagamia concluded that Mr. Shannon most likely had chronic obstruction of his right iliac artery which was causing the symptoms in his right lower extremity (Id.). As a result, Dr. Nagamia recommended that Claimant undergo a bypass graft, which would allow blood to bypass the occlusion and improve the blood supply of the right leg (Id.). According to Dr. Nagamia, a successful bypass graft, which is 90-95% likely, would relieve Mr. Shannon of his pain associated with claudication, as well as his rest pain, thereby enabling him to walk and function better (Id.). However, Dr. Nagamia pointed out that such surgery would not improve Claimant's neurological symptoms (Id.). When asked about the relation between Claimant's leg condition and the work-related accident, Dr. Nagamia testified that trauma can aggravate a chronic obstructive condition of the arteries as long as the trauma is directly involving the arteries themselves (Id.). In regards to some of the items recommended in the Rothman Report, Dr. Nagamia testified that Mr. Shannon, as of the last time he was evaluated, was able to move around without a motorized scooter (Id.). Additionally, Dr. Nagamia opined that there was no need for a raised toilet seat because individuals with claudication do not have weakness in the legs (Id.).

Claimant underwent an Independent Medical Examination with Rodolfo Eichberg, M.D., F.A.A., PM&R, on May 2, 2002 (EX 12). Before examining Mr. Shannon, Dr. Eichberg reviewed Claimant's multiple medical records, ranging from psychiatric and psychological notes to cardiological notes, and discussed his medical history with Mr. Shannon and his wife (Id.). Upon physical examination, Mr. Shannon complained of headaches, neck pain, right shoulder pain, mid and lower back pain, pain in his right lower extremity, dizziness and sleeping problems (Id.). Additionally, Claimant stated that he has fallen three (3) or four (4) times in the past few months (Id.). From a psychological standpoint, Mr. Shannon complained of severe panic attacks, anxiety, depression and uneasiness (Id.). Based upon his physical examination of Mr. Shannon and a thorough review of his medical, social and employment histories, Dr. Eichberg diagnosed Claimant as having chronic pain syndrome; anxiety; depression; and anger, as well as other psychological abnormalities (Id.).

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[6] It must be noted that Dr. Nagamia testified that Claimant did not report that he had five (5) prior angioplasties for blockage (EX 2).

In addition to his independent examination of Mr. Shannon, Dr. Eichberg was posed with the following questions relating to Claimant's condition.

> Q: Does Mr. Shannon actually have a problem with mobility, ambulation and/or falling down? If so, what is causing this problem? What is the etiology?
>
> A: Mr. Shannon does indeed have a problem with mobility and ambulation. As for his falling, I cannot find any neuromuscular cause for these falls. The fact that he was seen in a hospital with an episode of hypotension makes me suspect that these episodes may well be secondary to orthostatic hypotension. As far as his mobility and ambulation is concerned, the problem is primarily one of cardiovascular and pulmonary capacity. I do not believe that any of his neuromuscular complaints would in and by themselves restrict his mobility or ambulation.
>
> Q: What are your thoughts as to whether or not his vascular problems in his legs are the sole cause of ambulation problems? Are they related?
>
> A: I believe that my answer above partially answers this question. His vascular problems in the lower extremities certainly will cause ambulation problems including claudication, which is a typical symptom of peripheral vascular disease. On physical examination, I was not able to palpate a pulse on the right ankle or foot. I cannot say within reasonable medical certainly that this is the only cause of his ambulation problems. His ambulation radius is certainly limited by his pulmonary problems. I do not believe that any of his musculoskeletal complaints would, in and by themselves, limit ambulation. His psychological problems may also influence his ambulation as much as they can influence any other or one of his activities.
>
> Q: If you believe he is in need of further care, please specify the fact and duration.
>
> A: From a musculoskeletal point of view, this patient has not benefitted from the gamut of care he has received, both from the orthopedic and pain management point of view. I do not believe that any further physical therapy would benefit him. As far as pain management is concerned, Dr. Kabaria released him. He does need ongoing psychiatric care. He also needs care for his pulmonary, cardiovascular and peripheral vascular diseases.

(Id.).

In addition to his medical report, the parties took Dr. Eichberg's deposition testimony on May 13, 2002 (EX 1). In his deposition, Dr. Eichberg reiterated many of his observations and answers to questions that he provided in his medical report (Id.). As for Mr. Shannon's capability of returning to work, Dr. Eichberg testified that Claimant could return to sedentary work and it would be based on his cardiac and pulmonary status (Id.). In regards to Mr. Shannon's leg condition, Dr. Eichberg testified that Claimant's pain related to ambulation is claudication which

is vascular and unrelated to his accident at work (Id.). Turning to the recommendation for a jazzy scooter, Dr. Eichberg agreed with the recommendation because it would assist the Claimant in ambulation and benefit his vascular and respiratory problems[7] (EX 1, CX 24). Therefore, Dr. Eichberg concluded that the necessity of the scooter is caused by vascular and pulmonary problems (Id.).

Claimant underwent an abbreviated neuropsychological examination with Alan Saunders, Ph.D. on May 9, 2002[8] (EX 11). Prior to his examination of Mr. Shannon, Dr. Saunders undertook an extensive review of Claimant's medical records and his medical history, specifically the time following his work-related incident (Id.). During the exam, Mr. Shannon complained that his right leg hurts all the time, as does his low back and mid back underneath the shoulder blades, and pain in the right arm and neck (Id.). Claimant attended the exam in a wheelchair and carried a cane (Id.). Dr. Saunders noted that Mr. Shannon was pleasant and appeared cooperative, but the neuropsychological and personality testing were deferred due to the one (1) hour restriction (Id.). In his report, Dr. Saunders agreed with Dr. Kaplan on the cognitive issue whereby it is highly questionable and doubtful that the described accident led to the Claimant's current cognitive complaints (Id.). Rather, Dr. Saunders opined that a more likely explanation would be his multiple medical illnesses (Id.). From a psychiatric standpoint, Dr. Saunders believes that Claimant's diagnosis is anger towards his Employer rather than a psychiatric illness or disorder[9] (Id.). Dr. Saunders concluded by stating that Mr. Shannon's disability is primarily due to his physical/mental ailments rather than a disabling mental condition (Id.).

Dr. Saunders offered deposition testimony on May 16, 2002 (EX 19). For the most part, Dr. Saunders reiterated his opinion contained in his medical report. However, Dr. Saunders stated that he did not see a lot of depression from the Claimant (EX 19). Dr. Saunders further provided that Claimant reached maximum medical improvement, from a psychological standpoint, two (2) years and nine (9) months following the accident; therefore, no further psychological treatment

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[7] Specifically, Dr. Eichberg stated that "[h]e (Claimant) would get around better with a scooter. I rarely recommend the scooter in my practice because I believe in exercise and that's how I make a living, but this man's vascular and respiratory problems are such that I don't think – if you get his legs better, his coronaries are going to give out. And if his coronaries don't give out, some other blood vessel is going to give out, and his lungs are not going to get any better" (EX 1).

[8] According to the Dr. Saunders' medical report, Mr. Shannon was previously scheduled for an extensive neuropsychological examination (approximately 10.5 hours in length), but due to a court ruling, Mr. Shannon could not be examined for more than one (1) hour (EX 11).

[9] Dr. Saunders' opinion, herein, is based on the medical records that suggest that the Claimant has made a mental adaptation to the present situation (EX 11). Furthermore, Dr. Saunders testified that Claimant began to lose control with anger when he talked about his Employer (EX 19).

would be beneficial to Mr. Shannon (Id.). Additionally, Dr. Saunders disagreed, for the most part, with Dr. Delaney's diagnosis[10] (EX 19). Lastly, Dr. Saunders opined that, from a mental/psychological standpoint, the Claimant does not need a jazzy scooter (Id.).

At hearing, testimony was received from four (4) witnesses. The Claimant took the stand first and testified as to his work history and medical condition, as well as how he is able to cope under the present circumstances. Mr. Shannon testified that he presently suffers from bad headaches and has problems with his right side, right leg, shoulder, waist, hips and complained of a numb spot on the back of his neck (Tr. 53-55). On cross-examination, Claimant stated that there was a time after the accident where his condition did not necessitate use of a wheelchair (Tr. 74). However, Mr. Shannon further testified that "as he went along, I've gradually gotten worse and worse with the problem in the right leg and lower back having worsened the most" (Tr. 74-75). When questioned about whether he would need assistance, i.e. a wheelchair or cane, if the pain/problems in his right leg went away, Claimant responded "maybe, but don't know because its not only the pain, leg gives out for no reason" (Tr. 75).

From a mental standpoint, Claimant testified that he suffers from panic attacks to the point where he crawls into a fetal position and screams due to his belief that someone is going to hit him (Tr. 56). Mr. Shannon additionally stated that he has trouble reading, often forgets what he's doing and has trouble sleeping in bed (Tr. 56-57). Socially, Claimant testified that he has problems getting dressed, getting out of bed and only sleeps two (2) to three (3) hours a night because he hurts (Tr. 58).

On cross-examination, Mr. Shannon testified about his heart problems which began in 1990 (Tr. 65). Specifically, the Claimant testified that he had suffered five (5) separate heart attacks, requiring him to undergo an angioplasty each time (Tr. 65-66). Additionally, Claimant testified that he had an incident in December of 2001 where he thought he was having a heart attack and as a result, he had stints placed in his heart to open up the arteries (Tr. 66-67). Thereafter, blockage was found in the artery of Claimant's left leg, thereby requiring him to have stints placed in this artery in order to open it and let blood flow through (Tr. 68). More recently, Claimant was told that the artery in his right leg is almost completely blocked (Tr. 69). However, a bypass graft procedure was recommended this time, rather than having stints placed in the artery (Id.).

A former co-worker of the Claimant's, Timothy Eustice, was the next witness to testify at hearing. Mr. Eustice offered testimony about the work entailed as a gantry operator, which was the Claimant's position while he was employed with IMC Agrico (Tr. 81-86). Because of the limited issues left to be determined, Mr. Eustice's testimony offers no determinative value as to what's left to be decided.

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[10] Dr. Saunders disagreed with the Dr. Delaney's diagnosis of panic disorder, post-concussional syndrome, personality disorder and his opinion that Claimant cannot drive (EX 19). However, Dr. Saunders agreed with Dr. Delaney's opinion wherein he found pain syndrome, post-accident (Id.).

Next to testify was Michael Shannon, Claimant's son. Mr. Shannon testified that his parents moved in with him approximately a year ago because his father could not get up and down the stairs at their home (Tr. 95, 97). Mr. Shannon further testified that he, along with his mother and brother, helps the Claimant gets dressed and gets him food (Tr. 94). Lastly, Mr. Shannon testified that initially his father did not need assistance walking, but he began using a cane probably around a year after the accident (Tr. 95-96).

The final witness to testify was Claimant's wife, Lila Shannon. Mrs. Shannon offered testimony about the Claimant's condition and how it has worsened (Tr. 100-102). Additionally, she testified that they bought Mr. Shannon a lift chair for $300.00 and a walker which were both recommended in the report submitted by Phyllis Rothman (Tr. 105, 108-109). Lastly, Mrs. Shannon testified that Claimant's condition is getting to her, mentally – "stress is getting to me" – and physically – "have physical problems helping Claimant due to the difficulty of helping him back up" (Tr. 107-108).

Based on the testimony offered, I find Mr. Shannon's testimony in relation to his symptoms and pain to be credible. Furthermore, I accept the testimony of Mr. and Mrs. Shannon as credible wherein they state that they are under stress.

Discussion

Medical Treatment

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §§ 907(a).

A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. ***Turner v. Chesapeake & Potomac Tel. Co.,*** 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. ***Pernell v. Capitol Hill Masonry,*** 11 BRBS 532, 539 (1979). A judge has no authority to deny a medical expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. ***Turner,*** 16 BRBS at 257. The Employer is only liable, however, for the reasonable value of medical services. See 20 C.F.R. § 702.413; ***Bulone v. Universal Terminal & Stevedoring Corp.,*** 8 BRBS 515, 518 (1978); ***Potenza v. United Terminals Inc.,*** 1 BRBS 150 (1974, *aff'd*, 524 F.2d 1136, 3 BRBS 51 (2nd Cir. 1975).

Before it can be determined whether the medical items recommended in the Rothman Report are reasonable and necessary medical expenses, it must first be determined whether Claimant's problems, both physical and psychiatric, are causally related to the work-related accident and the injuries sustained thereafter. Because Claimant alleges to suffer from both physical and

psychiatric problems, I will make separate determinations as to whether they are causally related to the accident.

The Claimant argues that the deterioration caused by Claimant's back and neck injuries have affected his mobility or ambulation to the point where he needs medical assistance. The Claimant further argues that the medical items recommended in the Report submitted by Phyllis Rothman (CX 12) are reasonable and necessary medical expenses that are causally related to his September 28, 1999 work-related accident. In support, the Claimant offers the medical opinions Drs. Martinez, his treating neurologist, and Kabaria, his treating physician for pain management. Both physicians opine that the recommendations in the Rothman Report are reasonably and medically necessary, and causally related to the Claimant's work injury (EX 4, CX 14).

Dr. Martinez, a board certified neurologist, first saw Claimant on January 10, 2000 and treated him on five (5) other occasions, with the last taking place on April 9, 2002 (CX 3). At that time, Dr. Martinez opined that Claimant reached maximum medical improvement (Id.). Dr. Martinez further opined that, as a result of Claimant's work-related accident, he sustained a cerebral concussion which produces symptoms such as having trouble thinking, losing his temper, and depression (Id.). Furthermore, Dr. Martinez believes that Mr. Shannon suffers from chronic cervical thoracic and lumbosacral strain with multiple level arthritis of the spine and chronic insomnia (Id.). These conditions, according to Dr. Martinez, are related to his work injury and have rendered him totally disabled (Id.). Based on Claimant's condition, Dr. Martinez concluded that the recommendations in the Rothman Report are reasonable and medically necessary (Id.).

Throughout 2001, Claimant was also under the care of Dr. Kabaria, an anesthesiologist and pain management specialist who treated Mr. Shannon for his pain symptoms and spine pathology (EX 16). Based on his treatment of Claimant, Dr. Kabaria endorsed Dr. DeVine's prescription for the jazzy scooter (CX 4). Moreover, Dr. Kabaria testified in his deposition that the need for the scooter is causally related to his work injury as a result of the degenerative conditions in his back (lumbar disc) and leg (Id.). Lastly, Dr. Kabaria stated that he would defer to the Rothman Report for the equipment needed in Claimant's home (Id.).

On the other hand, the Employer maintains that Claimant's ambulation problems are the result of his heart and pulmonary problems, which have been ongoing for over a decade. However, if it is determined that Mr. Shannon's cardiovascular and pulmonary condition is related to his work-related injury, the Employer argues that the equipment recommended in the Rothman Report is neither medically reasonable, nor necessary. In support, the Employer offers various medical opinions that conclude that Claimant's ambulation problem is vascular in nature and unrelated to his work-related accident.

The Employer first offers the medical opinion of Dr. Nagamia, Claimant's treating heart surgeon who treated him for his peripheral vascular disease. Dr. Nagamia diagnosed Claimant's condition in his right lower extremity as chronic obstruction of his right iliac artery, which causes claudication or pain while walking or exercising (EX 2). As mentioned above, Dr. Nagamia

believes that this condition would most likely be corrected (90-95%) after the recommended bypass graft surgery (Id.). Dr. Nagamia does acknowledge that such surgery would not improve Mr. Shannon's neurological symptoms (Id.). Therefore, Claimant's neurological complaints – cervical thoracic and lumbosacral strain – will still be present (Id.). However, Dr. Nagamia found that the Claimant was able to move around without a motorized scooter, and further opined that there was no need for a raised toilet seat because individuals with claudication do not have weakness in the legs (Id.).

The Employer also offers the medical opinion Dr. Eichberg, a board certified physician in physical medicine and rehabilitation (EX 1). Following an independent medical examination of Mr. Shannon, Dr. Eichberg found Claimant's problems with mobility and ambulation as primarily one of cardiovascular and pulmonary capacity (Id.). As for Claimant's leg condition, Dr. Eichberg concluded that the pain related to ambulation is claudication which is vascular and unrelated to Claimant's accident at work (Id.). Lastly, Dr. Eichberg opined that, while the recommendation of the jazzy scooter would benefit Claimant's vascular and respiratory problems, the necessity of the scooter is caused by vascular and pulmonary problems (Id.).

Turning to Mr. Shannon's psychiatric condition, Claimant provides the medical opinion of Dr. DeVine, his treating psychiatrist who is board certified in neurology and psychiatry (CX 1). Dr. DeVine treated Mr. Shannon for two (2) years, from May, 2000 until April, 2002 (CX 1, EX 6). After performing a psychiatric evaluation, Dr. DeVine opined that Claimant suffered from a moderate to severe case of panic disorder without agoraphobia, secondary to his traumatizing work-related accident (Id.). In addition, Dr. DeVine testified that Claimant suffered from major depression, recurrent, and its moderate in its intensity (Id.). Over time, Dr. DeVine noted that Claimant developed anxiety-related tremors in his legs and difficulty with ambulation (Id.). Dr. DeVine concluded that Claimant's current symptoms were a result of his difficulty ambulating and chronic pain as a result of his work-related injuries (Id.). Based on this, Dr. DeVine, on August 13, 2001, prescribed a Jazzy 1120 Power Chair for the Claimant (CX 11). Dr. DeVine later testified that the prescription was both medically and psychiatrically necessary for the Claimant, who is debilitated, to become more mobile (CX 1). Dr. DeVine further testified that the Claimant is in need of the scooter because of his pain affects his self-esteem adversely, which exacerbates both the anxiety and mood disorder (Id.). Lastly, Dr. DeVine testified that Claimant's psychiatric conditions are causally related to his work injury (Id.).

The Claimant also submits a medical report from Dr. Delaney, board certified in psychiatry and neurology, who performed a psychiatric evaluation on Mr. Shannon (CX 14, EX 7). Following his examination, Dr. Delaney diagnosed Claimant as having panic disorder with agoraphobia; depression secondary to pain syndrome; post-concussional syndrome (mild) by history; and personality disorder, including passive aggressive, somatization and hysterical features (Id.). In his report, Dr. Delaney opined that Mr. Shannon's panic symptoms and depression are related to his injury and that there is some evidence of a post-concussional syndrome which, although mild, may be causing some of his psychiatric symptoms (Id.). Lastly, Dr. Delaney reported that Claimant cannot drive, but it would be helpful to encourage him to gradually resume driving once

his panic has subsided somewhat (Id.).

Alternatively, the Employer first offers the medical opinion of Dr. Kaplan, who performed a psychological evaluation of Mr. Shannon (EX 8). Despite noting that Claimant suffered a catastrophic psychiatric reaction to his injury, Dr. Kaplan reported that Mr. Shannon's complaints and behaviors are not consistent with identifiable pathology (Id.). Dr. Kaplan further reported that Claimant's understanding of his injury, of anatomy and pathology were inadequate and distorted, which may reflect his significant lack of education or intellectual ability (Id.). Nonetheless, Dr. Kaplan diagnosed Claimant with major depression, recurrent, 296.32 (Id.). Dr. Kaplan concluded that, given the facts of the work-related accident, the likelihood of a significant traumatic head injury is slim (EX 8). However, Dr. Kaplan did not anticipate that the Claimant will ever return to work, given his multiple complaints, his severely impaired presentation, and his likely lack of financial incentive, given the acceptance into Social Security Disability (Id.). Lastly, it was reported that Claimant's psychiatric symptoms could be modified (Id.).

The Employer's final medical opinion was offered by Dr. Saunders, a clinical psychologist (EX 11). Speaking to Mr. Shannon's cognitive complaints, Dr. Saunders opined that it is highly questionable and doubtful Claimant's accident was the cause (Id.). Rather, Dr. Saunders opined that a more likely explanation would be Claimant's multiple illnesses (Id.). Dr. Saunders concluded that Mr. Shannon's disability is primarily due to his physical/mental ailments rather than a disabling mental condition (Id.). During his deposition, Dr. Saunders stated that he did not see a lot of depression from the Claimant (CX 1A, EX 19). Dr. Saunders further testified that, from a psychological standpoint, Claimant reached maximum medical improvement thirty-three (33) months after the accident, and therefore, the he did not need a jazzy scooter from a mental/psychological condition (EX 19).

It is solely within my discretion to accept or reject all or any part of any testimony. ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). Therefore, I have discretion to accept all of the Claimant's assertions, or accept those that I consider to be substantiated by other evidence.[11]

When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LWHCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998); *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001); ***Lozada v. Director, Office of Workers' Compensation Programs***, U.S. Dept. of 1991 A.M.C. 303 C.A.2,1990; Longshore and Harbor Workers' Compensation Act, §§ 1 et seq. In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir., 1997), an

[11] The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." ***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 **U.S.** 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

ALJ's findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician. However, I must apply substantial evidence. ***Director v. Newport News Shipbuilding & Dry Dock Co., (Carmines)***, 138 F.3d 134, 140 (4th Cir.1998) states: "[t]he ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Id.* To be sufficient, the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Richardson v. Perales***, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)) (internal quotation marks omitted); ***See v. Washington Metro. Area Transit Auth.***, 36 F.3d 375, 380 (4th Cir.1994).

Generally, I am entitled to give greater weight to opinion of treating physician than to that of non-treating physicians, ***Morehead Marine Services, Inc. v. Washnock***, 135 F.3d 366 (6th Cir., 1998).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. ***Atlantic Marine v. Bruce,*** 661 F.2d 898 (5th Cir. 1981), *aff'g* 12 BRBS 65 (1980). The Employer argues that Claimant's problems with mobility or ambulation are primarily cardiovascular and pulmonary in nature. Essentially, the Employer is arguing that the Claimant's peripheral vascular disease is an independent, intervening cause to Claimant's mobility or ambulation problems. In support, the Employer offers the opinions of Dr. Nagamia and Dr. Eichberg. Dr. Nagamia diagnosed Claimant's condition in his right lower extremity as chronic obstruction of his right iliac artery, which causes claudication (EX 2). And as alluded to above, Dr. Nagamia believes that Claimant's condition would most likely be corrected after the recommended bypass graft surgery (Id). Dr. Eichberg substantiates Dr. Nagamia's opinion wherein he opines that Claimant's problems with mobility or ambulation are a result of his vascular and pulmonary problems (EX 12). Furthermore, the medical opinions of Drs. Nagamia and Eichberg are reasoned and well-documented.

For his physical condition, the Claimant offers the medical opinions from Drs. Martinez and Kabaria, both treating physicians. As stated above, Dr. Martinez diagnosed Claimant with a cerebral concussion; chronic cervical, thoracic and lumbosacral strain with degenerative arthritis; and insomnia – all of which are a direct result of Claimant's work-related accident (CX 3). However, Dr. Martinez, on cross-examination, testified that Mr. Shannon never complained of problems with his legs or with walking (Id). Dr. Martinez further testified that he never restricted Mr. Shannon with respect to walking (Id.). Lastly, Dr. Martinez testified that, given the date of Claimant's accident (September 28, 1999), he would expect the Claimant to have problems walking by the time he saw him in July of 2000 (Id.).

Based on the deposition testimony of Dr. Martinez, it can be deduced that the injuries for which

he was treating the Claimant are not related to Mr. Shannon's ambulation or mobility problems. Specifically, Dr. Martinez offered testimony that the Claimant: would walk in and out of his appointment; never reported problems ambulating or walking; was never given restrictions with regards to walking; failed to report weakness in his lower extremity (CX 3). Dr. Martinez clearly did not treat Mr. Shannon for lower extremity problems because the symptoms he was treating Claimant for – cerebral concussion, chronic cervical, thoracic and lumbosacral strain with degenerative arthritis and insomnia – did not affect his mobility or ambulation. Otherwise, Dr. Martinez would have known about these problems and offered a diagnosis whereby Mr. Shannon's back and neck injuries were causing him mobility problems. It is for these reasons that I cannot afford "special" weight to the medical opinion of Dr. Martinez, Claimant's treating neurologist. Therefore, as to the causation of any ambulation problems tha Claimant may have, I give little weight to Dr. Martinez's medical opinion.

Dr. Kabaria is a treating physician as well and he rendered a conclusion that degenerative conditions in Mr. Shannon's back and leg are causally related to his work injury and require the need for the jazzy scooter (CX 4). Such conclusion is suspect when Dr. Kabaria, upon examination of the Claimant, reported that Claimant: has a normal gait; normal heal-to-toe; normal coordination; normal/intact motor, sensory, and reflex function; exhibited no problem walking; and tested negative for sciatica and radiculopathy in the lumbar spine (Id.). When questioned about these findings, Dr. Kabaria maintains that one's condition – Claimant's herein – can deteriorate over a period of time (Id.). However, when asked whether it would be unusual for a person sixteen (16) months after an event to not have any problems ambulating or walking, then to subsequently develop those problems, but yet it's related to the original event 16 to 24 months earlier – Dr. Kabaria responded that "it is unusual, but it can happen" (Id.). However, on cross-examination, Dr. Kabaria testified that it's likely that Claimant's ambulation problems are related to his vascular condition rather than his degenerative disc disease (Id.). Additionally, Dr. Kabaria displayed a lot of reluctance when discussing the reasoning for his endorsement of Dr. DeVine's prescription for the jazzy scooter. For instance, again on cross-examination, Dr. Kabaria testified that he thought that the prescription he endorsed was from Primary Care Physician, rather than a psychiatrist (Id.). Further questioning in regards to his endorsing the prescription for the scooter went as follows:

> Q. Are you surprised today to hear that the request for a scooter came from his psychiatrist?
>
> A. That was - - I was not aware of that, let's put it that way.
>
> Q. And is that surprising for you to - - wouldn't you expect a recommendation for a scooter related to ambulation problems to come from a physician who is treating him for physical problems as opposed to psychological or psychiatric problems?
>
> A. That is the usual route.

I find Dr. Kabaria's testimony to be conflicting wherein he states that Claimant's ambulation problems are likely related to his vascular problems, despite concluding that Claimant's degenerative leg condition is related to his work injury. And he conceded that he would not give

full credence to a physician who has prescribed medical treatment in an area outside his area of specialization. For these reasons, I cannot afford his opinion "special" weight, since he did not have a complete history and merely relied on an earlier unreasoned prescription. Based on the responses, I must discount Dr. Kabaria's endorsement of Dr. DeVine's prescription for the jazzy scooter. And I also must give limited weight to his opinion on whether any ambulation problems are causally connected to this accident.

It is interesting that the Claimant did not develop whether his ambulation problems were pre-existing, or were aggravated or exacerbated by the compensable accident.

Taking the reasoned medical opinions of Drs. Nagamia and Eichberg together with Mr. Shannon's history of heart problems – Claimant testified to having five (5) heart attacks prior to his work-related accident (Tr. 65-66), as well as blockage in the artery in his left leg which required surgery (Tr. 68) – the Employer has provided sufficient evidence whereby the Claimant's vascular and pulmonary problems constitute an intervening cause. Therefore, I find that the physical problems that affect Mr. Shannon's ambulation or mobility are not as a result of his September 28, 1999 work-related accident. Instead, the symptoms arising out of Claimant's peripheral vascular disease are the cause of his mobility or ambulation problems.

Because the Claimant alleges to suffer from psychiatric problems as well, it must next be determined whether such problems are related to the work-related accident. The Claimant offers the opinions of Drs. DeVine and Delaney, both of whom are board certified in psychiatry and neurology (CX 1, CX 14). Both physicians diagnosed Claimant as suffering from panic attacks, recurrent depression, post-concussional syndrome and chronic pain syndrome (Id.). Additionally, both physicians related these problems and symptoms to Claimant's work-related accident (Id.).

Alternatively, the Employer submits the medical opinions of Drs. Kaplan and Saunders. Following his psychological evaluation of Claimant, Dr. Kaplan opined that Claimant suffered a catastrophic psychiatric reaction to his injury, whereby his complaints and behaviors are not consistent with his identifiable pathology (EX 8). Moreover, Dr. Kaplan diagnosed Mr. Shannon as having major depression (recurrent), which appears to be temporally related to the accident (Id.). Thereafter, Dr. Saunders, a Clinical Psychologist (EX 19), performed an abbreviated neuropsychological examination of the Claimant. In agreement with Dr. Kaplan, Dr. Saunders opined that it is highly questionable and doubtful that the work-related accident led to Claimant's current cognitive complaints (Id.).

Dr. Saunders is the only physician of the aforementioned that "did not see a lot of depression from the Claimant" (EX 19). Drs. DeVine, Delaney and Kaplan all provided that Claimant suffered from depression. Dr. Kaplan, whose ultimate findings are in accord with Dr. Saunders', found that Mr. Shannon suffered from major, recurrent depression (EX 8). As such, Dr. Saunders opinion can be deemed contradictory to that of Drs. DeVine, Delaney and Kaplan. And the treatment record substantiates that the Claimant has cardinal signs of depression. Moreover, he is merely an examining physician and has had limited personal contact with the Claimant, whereas

his treating phycicians have seen the Claimant over a long period of time.[12] Therefore, Dr. Sanders' opinion is entitled to less weight than those of the treating mental health practitioners and even that of Dr. Kaplan.

This leaves the medical opinions of Drs. DeVine, Delaney and Kaplan. Each physician concluded that Claimant's psychiatric problems are related to his September 28, 1999 work accident, albeit it is Dr. Kaplan's belief that such problems are only temporary. Furthermore, Dr. DeVine is Mr. Shannon's treating psychiatrist who had the opportunity to evaluate the Claimant for approximately two (2) years, as opposed to the single visit the Claimant had with Drs. Delaney and Kaplan.[13] As a result, I afford greater weight to the medical opinion of Dr. DeVine, as it relates to Claimant's psychiatric problems. Therefore, I find that Mr. Shannon's psychiatric problems are related to his work accident that took place on September 28, 1999.

Despite concluding that Claimant's psychiatric problems are related to his work accident, I must determine whether such problems affect Mr. Shannon's ability to ambulate. As noted previously, Dr. DeVine prescribed a jazzy power chair for the Claimant on August 13, 2001 (CX 13). Dr. DeVine testified that Claimant developed anxiety-related tremors in his legs and difficulty with ambulation (Id.). Dr. DeVine concluded that Claimant's current symptoms were a result of his difficulty ambulating and chronic pain as a result of his work-related injuries (Id.). However, Dr. DeVine testified in his deposition that he first became aware of Claimant's problems ambulating on January 7, 2002 (CX 1). To the contrary, at the time he prescribed the jazzy scooter for the Claimant, it is apparent that Dr. DeVine did so despite the fact that Mr. Shannon was having no difficulty ambulating and gave no reason for Dr. DeVine to believe otherwise. No spasm ot tremor was noted at or prior to the time that the prescription for the scooter was made. While it's possible that the jazzy scooter was necessary on August 13, 2001, such possibility is undermined when Dr. DeVine testified that the scooter is needed because of Claimant's psychiatric problems (depression and panic disorder) in conjunction with physical condition (Id.), which at that time did not include ambulation problems. In a further attempt to justify his statement, Dr. DeVine offered that, when he refers to Claimant's physical problems, he is referring to his chronic back and neck pain (Id.). While this might be the case, Dr. DeVine is basing such physical problems on the statements made by Claimant and his wife and are not based on the medical record as there is no evidence of radiculopathy into the legs and there is no evidence that the work injury in any way affected the legs mechanically, orthopedically or neuologically. Furthermore, I have already determined that Claimant's difficulty with mobility or ambulation is not related to his work-related back and neck injuries. As a result, it can be deduced that Dr. DeVine's prescription for the jazzy scooter was based solely on Claimant's psychiatric problems. And Dr. DeVine testified that the scooter is needed because of a combination of Claimant's psychiatric *and* physical problems.

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[12] *See* ***Morehead Marine Services, Inc. v. Washnock****, supra*.

[13] ***Amos v. Director, Office of Workers' Compensation Programs***, ***American Stevedoring Ltd. v. Marinelli,; Lozada v. Director, Office of Workers' Compensation Programs****, all supra*.

When questioned about Claimant's medical history/background, Dr. DeVine testified that he did not review any of Claimant's medical records (CX 1). Moreover, Dr. DeVine stated that he did not speak with any of the physicians treating Mr. Shannon, nor did he review any medical reports submitted in regards to Claimant's condition (Id.). Lastly, Dr. DeVine testified that he became aware of Claimant's physical problems, with regard to ambulation, through his observations and statements made by Mr. Shannon and his wife (Id.). Despite the fact that Dr. DeVine has had the opportunity to evaluate the Claimant on a monthly basis, his failure to review Mr. Shannon's medical history requires me to find his medical opinion, as it relates to Claimant's ambulation problems, is not well-documented. And if his prescription for the scooter was based in large part on a misconception, the opinion is not well reasoned.

A claimant must establish that requested medical treatment is related to the compensable injury. ***Pardee v. Army & Air Force Exch***. Serv., 13 BRBS 1130 (1981); ***Suppa v. Lehigh Valley R.R. Co.***, 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. For example, an employer must pay for the treatment of the claimant's myocardial infarction, if the judge finds that it is causally related to a prior work-related injury. See ***Atlantic Marine v. Bruce***, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980).

However, as to the causation of problems of ambulation, based on the foregoing, Dr. DeVine's medical opinion as to Claimant's ambulation problems is poorly documented, and is poorly reasoned. As such, the medical opinion of Dr. DeVine must be discounted as it relates to the cause of Claimant's ambulation or mobility problems.

The remaining psychiatric opinions are from Drs. Delaney and Kaplan, who both concluded that Claimant's psychiatric problems are related to the September 28, 1999 accident[14] (EX 7, EX 8). Dr. Delaney went a bit further, whereby he opined that Mr. Shannon could be suffering from post-concussional syndrome which, although mild, may be causing some of his psychiatric symptoms (EX 7). Most importantly, neither physician offered an opinion as to the debilitating effect of Claimant's psychiatric condition, i.e. whether it affected Claimant's ability to ambulate or mobilize. In fact, Dr. Delaney concluded that, while Claimant could not drive at the time he was evaluated, it would be helpful to encourage Mr. Shannon to gradually resume driving once his panic has subsided somewhat (Id.). Having encouraged the Claimant to eventually resume driving an automobile, I can only deduce from Dr. Delaney's opinion that he is under the impression that Claimant's psychiatric problems do not
affect his ability to ambulate or mobilize.

Medical care must be appropriate for the injury. *See* 20 C.F.R. § 702.402. ***Ballesteros v. Willamette Western Corp***., 20 BRBS 184, 187 (1988); ***Turner v. Chesapeake & Potomac Tel. Co.***, 16 BRBS 255 (1984); ***Scott v. C & C Lumber Co.***, 9 BRBS 815 (1978). Again, the

[14] Dr. Kaplan, however, reported that Claimant's depression appears to be temporally related to the accident (EX 8).

Claimant failed to establish whether the psychiatric problems have the nature, intensity and severity to cause problems of ambulation that necessitates the need for the jazzy scooter.

Based on the foregoing, although Drs. Delaney and Kaplan are not treating sources, their opinions are based on a better understanding of the chronology of the Claimant's medical history and are more rational than the remaining opinions as to a psychiatric need for an assistive device for ambulation. I must attribute greater credit to the medical opinions of Drs. Delaney and Kaplan as they relate to the Claimant's problems with mobility or ambulation. Thus, I find that Mr. Shannon's psychiatric problems do not affect his mobility or ambulation and therefore have no bearing on the recommendations to assist Claimant with his physical problems.

Rothman Report Recommendations

I must determine whether any of the recommendations made in the Rothman Report are reasonable, necessary and causally related to the September 28, 1999 work injuries. The parties have stipulated that the Claimant meets the criteria for permanent total disability, and therefore the Claimant is entitled to medical treatment stemming from that disability. Crediting Drs. Devine, Martinez, and Kabaria, the treating physicians, and noting that there is no probative evidence to show otherwise,[15] I conclude that Mr. Shannon's psychiatric problems – panic attacks and depression – are nonetheless related to the work-related accident. I also accept the diagnosis that the Claimant is limited and his injury affects the head, neck and upper back, which is uncontroverted in this record.

Much of the treatment for the items below was performed by Dr. Martinez, who treated Mr. Shannon's cerebral concussion, chronic cervical, thoracic and lumbosacral strain with degenerative arthritis and insomnia. As long as the expense is both reasonable and necessary, it must be provided. ***Parnell v. Capitol Hill Masonry***, 11 BRBS 532, 539(1979). As set forth above, with respect to the back brace, abdominal binder and family/marital counseling, the Employer/Carrier failed to provide contradictory testimony. The employer must raise the reasonableness and necessity of treatment. ***Salusky v. Army Air Force Exch. Serv***., 3 BRBS 22 (1975). Moreover, the treating source gave direct reasons for them and may be credited with special weight. ***Amos v. Director, Office of Workers' Compensation Programs***, ***American Stevedoring Ltd. v. Marinelli,; Lozada v. Director, Office of Workers' Compensation Programs***, *all supra*.

1. Wheelchair needs: The Rothman Report recommends a Jazzy 1120 to allow the Claimant to be more mobile (CX 5). Having already concluded that Claimant's peripheral vascular disease is the cause of his mobility or ambulation problems, I find that the need for the Jazzy Scooter, as prescribed by Dr. DeVine and endorsed by Dr. Kabaria, is unreasonable, unnecessary and not causally related to Claimant's work injuries. And as a result, the recommended renovations to Mr. Shannon's

[15] Although I conclude that Claimant's psychiatric problems have no causal relationship to an inability to use his lower extremities or to ambulate.

van and wheelchair ramps are not necessary either, as they are a consequence of the receipt of that scooter.

2. Architectural renovations: Ms. Rothman provides that Claimant's home needs architectural renovations in order to accommodate the jazzy scooter (CX 5). Included in these renovations are the widening of doorways of the bedroom and bathroom, ramping for the two (2) exits in Claimant's home and a cement walkway around his home to the driveway and down to the street for emergency purposes (Id.). As with the above-mentioned renovations, such architectural renovations are unnecessary since the recommendation for the jazzy scooter has been denied.

3. Independent Living Needs: Some of these needs include a reacher, adaptive utensils, a jar opener, a clipboard, a raised toilet seat, etc. (CX 5). Dr. Nagamia is the only physician to specifically offer a medical opinion as to these needs. In doing so, Dr. Nagamia testified that there is no need for a raised toilet seat because people with claudication don't have weakness in legs (EX 2). Because it is the claimant's burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988), I find that the independent living needs are not reasonable, necessary and causally related to Claimant's work injuries.

4. Facility Costs: Within this recommendation, Ms. Rothman believes that the Claimant should have a short stay inpatient rehabilitation evaluation to determine his present and future functional needs and prepare a program that would maintain his strength and keep him strong and independent as possible (CX 5). Once again, Claimant fails to offer a medical opinion that specifically cites these facilities costs as reasonable and necessary medical benefits. Alternatively, Dr. Martinez testified that the recommended short stay inpatient rehabilitation evaluation is not medically necessary (CX 3). Because it is the claimant's burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988), I find that the requested facility costs are not reasonable, necessary and causally related to Claimant's work injuries.

5. Future Medical Care: Herein, the Rothman Report requests a neuropsychological evaluation to determine Claimant's present status and losses (CX 5). This recommendation was made on October 5, 2001 (Id.). Thereafter, the Claimant underwent a neuropsychological evaluation with Dr. Saunders, dated May 9, 2002. Furthermore, a court order has limited the length of any neuropsychological evaluation to no longer than an hour (EX 11). Taking this coupled with the Claimant's inability to offer proof as to the necessity of a further neuropsychological evaluation, I find such recommendation unreasonable and unnecessary. *See generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988);

Ballesteros v. Williamette Western Corp., 20 BRBS 184 (1988).

6. Home Attendant Care: According to the Rothman Report, the Claimant needs assistance with his daily care, meal preparation and grooming; therefore, it would be helpful for the Claimant to have a home health aide for two (2) hours daily to help out with the above (CX 5). Having determined that Claimant's ambulation problems are not related to his work injuries, it would follow that the requested home attendant care would be unnecessary unless Claimant offers proof that such care is necessary for his psychiatric problems. Besides the blanket statements supporting all of the recommendations in the Rothman Report, Claimant failed to establish the necessity for the home attendant care. *See generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988). As such, the requested home attendant care is not reasonable, necessary and causally related to Claimant's psychiatric injuries.
7. Orthopedic Needs: Herein, Ms. Rothman recommends that Claimant would benefit from a walker for longer distances (CX 5). However, the use of a walker is related to Claimant's mobility or ambulation problems which are not related to his work injuries. Furthermore, Dr. Martinez testified, on cross-examination, that a cane (which the Claimant has) is good enough; a walker is not medically necessary (CX 3). For these reasons, the requested orthopedic needs are not reasonable, necessary and causally related to Claimant's work injuries.
8. Home Furnishings: Included in the home furnishings recommendation are a lift chair and an electronic hospital bed (CX 5). According to the report, the lift chair will assist the Claimant in getting up and out of a chair, whereas the full electronic hospital bed will enable the Claimant to get out of bed without assistance (Id.). As with many of the aforementioned recommendations, these home furnishing recommendations are requested in relation to Claimant's ambulation or mobility problems. As with the aforementioned recommendations, the Claimant has not offered specific proof for the necessity of these items. On the other hand, Dr. Martinez, when questioned about these recommendations on cross-examination, testified that a full electronic hospital bed is not medical necessary (CX 3). Based on the foregoing, the requested home furnishings are not reasonable, necessary and causally related to Claimant's work injuries.
9. Safety Issues: A smoke and fire alarm were recommended in order to allow Claimant time to get out of the home safely in the event of a fire (CX 5). As such, they are recommended in connection with Claimant's ambulation or mobility problems which are not causally related to his work injury. Therefore, the requested safety measures are not reasonable, necessary and causally related to Claimant's work injuries.
10. Educational Needs: A home computer was included in the Rothman Report in order to allow Claimant to have some activity during the days when he is home alone (CX 5). The only physician to specifically discuss the Claimant's need for a home computer was Dr. Martinez, who testified that the computer was not

medically necessary (CX 3). His testimony is credited. Therefore, the Claimant has not carried his burden of establishing the necessity for a computer. *See generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988). As such, the requested home computer is not reasonable, necessary and causally related to Claimant's psychiatric injuries.

11. Present Treatment: Ms. Rothman recommends that Claimant should presently be under the routine care of a physiatrist to assess his functional status and medication levels and prescribe for his future needs. Once again, the Claimant has failed to offer any medical opinion which specifically addresses this need. Therefore, the Claimant has not carried his burden of establishing the necessity for treatment with a physiatrist. *See generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988). As such, the requested home attendant care is not reasonable, necessary and causally related to Claimant's psychiatric injuries.

12. Evaluations: Included in the evaluations recommendation are occupational therapy, physical therapy, communication therapy, inpatient/outpatient evaluation for rehabilitation, nursing needs, dietary assessment, education evaluation, hearing test and speech therapy evaluation (CX 5). Claimant fails to offer a medical opinion that specifically cites these evaluations as reasonable and necessary medical benefits. On the other hand, Dr. Martinez, when questioned about the necessity of these evaluations, testified that "I really don't think he (Claimant) needs those" (CX 3). Additionally, Dr. Martinez labeled the recommended evaluations as "nice-to-have" (Id.). Because it is the claimant's burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988), I find that the requested evaluations are not reasonable, necessary and causally related to Claimant's work injuries.

13. Modalities: Included in this recommendation are individual counseling, family/marital counseling, speech therapy, occupational and physical therapy, support group meetings and YMCA membership (CX 5). For the most part, these modality recommendations have been discussed and determined to be unnecessary, unreasonable and not causally related to Claimant's work injuries. However, the recommendation for family/marital counseling should be discussed separately. While there is no specific medical opinion as to the necessity of such counseling, both the Claimant and Mrs. Shannon testified at hearing about the stress that has resulted from Mr. Shannon's work injuries. I have already accepted such testimony as credible. A review of the medical evince shows that the Claimant is depressed and has panic attacks and has limitations as to socialization. To any reasonable degree pof probability, this appeasrs to be reasonable, given the record. As long as the expense is both reasonable and necessary, it must be provided.

Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539(1979). An employer is liable for medical services for all legitimate consequences of the compensable injury. ***Lindsay v. George Wash. Univ.***, 279 F.2d 819 (D.C. Cir. 1960); *see also* ***Austin v. Johns-Manville Sales Corp***., 508 F. Supp. 313 (D.C. Me. 1981). The Employer/Carrier did not present any contrary evidence. The employer must raise the reasonableness and necessity of treatment before the judge. ***Salusky v.Army Air Force Exch. Serv***., *supra*. Therefore, I find the family/marital counseling to be reasonable, necessary and causally related to Claimant's work injuries. As a result, Claimant and Mrs. Shannon are entitled to such medical benefits.

14. Orthotic Needs: Ms. Rothman provides that the Claimant might benefit from a back brace, abdominal binder and wrist splints for support and comfort (CX 5). When questioned on cross-examination about these items, Dr. Martinez stated that "I think an abdominal binder and back brace might be helpful, but don't know why Claimant needs wrist supports" (CX 3). While Dr. Martinez's testimony isn't conclusive, given that there is no contradictory evidence, I accept it and afford it great weight. Moreover, it has already determined that Claimant's work-related physical injuries are limited to his back and neck problems to which a back brace and abdominal binder would attempt to alleviate. Therefore, I find the back brace and abdominal binder to be reasonable, necessary and causally related to Claimant's work injuries. As a result, the Claimant is entitled to such medical benefits.

Therefore, based on the foregoing, the Claimant is entitled to a back brace, an abdominal binder and family/marital counseling. The back brace and abdominal binder are reasonable and necessary medical benefits because they will assist Mr. Shannon in dealing with his back problems, which are causally related to his September 28, 1999 work accident. Moreover, Dr. Martinez – Claimant's treating neurologist – testified that these items would be helpful for the Claimant in dealing with his back problems. I accept the family/marital counseling as a reasonable and necessary medical benefit based on the credible testimony offered by the Claimant and his wife at hearing. Both testified as to the growing stress and marital problems that have accompanied Mr. Shannon's work-related injuries. For these reasons, I find the family/marital counseling to be causally related to the subject work accident and a reasonable and necessary medical benefit under Section 7 of the Act. As for the remaining items requested in the Rothman Report, I find them to be unreasonable, unnecessary and not related to Mr. Shannon's work-related injuries. Besides the recommendation for the jazzy scooter, the Claimant failed to offer a reasonable medical opinion as to why these items should be included as § 7 medical benefits. Instead, the Claimant submitted blanket assertions from his physicians whereby they opined that all of the items in the Rothman Report are reasonable, necessary and causally related to his work injuries. Dr. Martinez, for instance, offered that very same opinion; but when questioned on cross-examination about the reasonableness/necessity of each item, Dr. Martinez had to retract from his original position accepting the elements of the Rothman Report and had a hard time classifying many of the items in the Rothman Report as reasonable and necessary medical benefits. Rather, Dr. Martinez often labeled such items as "nice to have" (CX 3). An item that is "nice to have" doesn't quite

constitute a reasonable, necessary and causally related medical benefit. It is for these reasons that I find the Claimant to be entitled to a back brace, an abdominal binder and family/marital counseling for he and his wife.

Attorney's Fees and Costs

Claimant's counsel, Anthony V. Cortese, Esquire, by letter dated June 26, 2002, submitted a Petition for Attorney's Fees as to the issue of permanent, total disability. In it, Mr. Cortese requests a fee of fifty-two thousand, one hundred sixty-two dollars and fifty cents ($52,162.50), predicated on two hundred fifty dollars ($250.00) per hour for his work, as well as seventy-five dollars ($75.00) per hour for his paralegal's work. Costs in the amount of five thousand nine hundred twenty-eight dollars and thirty-five cents ($5,928.50) are also requested.

On July 17, 2002, the Employer/Carrier, IMC Agrico MP, Inc. and Travelers Insurance Co. (hereinafter "IMC"), filed an Opposition to Claimant's Fee Application. In its response, IMC enters several objections to the Fee Petition, which include an objection to the hourly rates set forth by Claimant's counsel, as well as to the number of hours claimed by Mr. Cortese.

Thereafter, Claimant's counsel submitted a Reply in Defense of the Fee Petition whereby he defends his hourly rate and many of the entries which are objected to by the Employer. Therein, Mr. Cortese also requests an additional 6.6 hours of time at a rate of $250.00 per hour for defending his Fee Petition.

Right to a Fee

On August 8, 2002, the Employer submitted a Supplemental Opposition to Claimant's Fee Petition, whereby it argues that it is not liable for Claimant's attorney fees under either Section 28(a) or 28(b) of the Act. IMC reasons that since it never denied compensation, it is not liable for fees pursuant to the provisions of Section 28(a). In furtherance, IMC argues that an award of attorney's fees under Section 28(b) would be inappropriate since it accepted the recommendations of the examiner and reinstated Claimant's temporary total compensation.

Claimant's counsel submitted a Reply to the Employer's Supplemental Opposition to Claimant's Fee Petition on August 27, 2002. In his reply, Claimant argues that by obtaining the benefit in formal litigation supports an award of attorney's fees under Section 28(a) or 28(b) for the time spent in formal litigation.

I need not address Employer's arguments which relate to liability under Section 28(a) of the Act, 33 U.S.C. §§ 928(a), as the case at bar is governed by Section 28(b). Section 28(b) applies when a controversy develops over additional compensation where the employer has tendered compensation or is voluntarily paying compensation pursuant to Sections 914(a) and (b). *See* 20 C.F.R. § 702.134(b). Section 28(b) provides when the employer voluntarily tenders payment without an award and thereafter a conflict arises over additional compensation, the employer will be liable for attorney's fees if the claimant is successful in obtaining greater compensation than that originally agreed upon by the employer. ***Universal Maritime Serv. Corp. v. Parker,*** 587

F.2d 608 (3rd Cir. 1978); ***Bjazevich v. Marine Terminals Corp.,*** 25 BRBS 240 (1991); ***Rihner v. Boland Marine & Mfg. Co.,*** 24 BRBS 84 (1990); ***Tait v. Ingalls Shipbuilding, Inc.,*** 24 BRBS 59 (1990); ***Finch v. Newport News Shipbuilding & Dry Dock Co.,*** 22 BRBS 196 (1989). In the present case, despite the fact that the Employer had been paying Claimant's temporary total disability benefits and later accepted the Claimant as permanent, totally disabled, IMC disagreed with the Claimant's request for additional medical benefits as contained in the Rothman Report. As Claimant's counsel was ultimately successful in obtaining additional compensation for claimant while the case was before the office of administrative law judges, albeit a small portion compared to what was requested, I find that the Employer is liable for Claimant's attorney's fee pursuant to Section 28(b).

Amount of the Fee

The Regulations provide that an approved attorney's fee shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits awarded. 20 C.F.R. §§ 702.132; ***Newport News Shipbuilding and Dry Dock Co. v. Graham,*** 573 F.2d 167 (4th Cir. 1978). Furthermore, if an administrative law judge is to reduce the amount of an attorney's fee award from the amount requested, (s)he is required to provide sufficient explanation of reasons for the reduction. ***Beacham v. Atlantic & Gulf Stevedores, Inc.,*** 7 BRBS 940 (1978).

IMC filed numerous objections to Claimant's counsel's fee petition. The vast majority of the Employer's objections are specific as to a multitude of Mr. Cortese's itemized entries. However, from a general standpoint, the Employer objects that many of the assertions found in Claimant's correspondence and court filings were repetitive, inaccurate, misleading or unnecessary. The Employer also contends that many of counsel's entries contain unrelated, clearly distinguishable activities listed together and billed under lump amount of time. Therefore, the Employer argues that Claimant's fee petition does not meet the regulatory requirements for filing an application for fees. The Employer next asserts that Claimant's fee petition is full of vague entries. IMC further objects to Claimant's counsel's requested hourly rate of two hundred fifty dollars ($250.00), as well as the hourly rate of seventy-five dollars ($75.00) per hour requested for Mr. Cortese's paralegal. Lastly, the Employer objects to all interoffice conferences held between Claimant's counsel and his paralegal.[16]

Before addressing the objections to Claimant's itemized billing entries, I must determine whether the hourly fee set forth by Claimant's counsel is fair and reasonable for the work performed in this case.

The Employer contends that the two hundred fifty dollar ($250.00) per hour fee requested by Claimant's counsel for services rendered by Anthony Cortese is excessive and unreasonable. The Employer argues that, if Claimant's counsel was as experienced as he insists in this area, then he

[16] Employer contends that "a review of her (paralegal's) entries show that she often spoke with individuals and then had a conference with the lead attorney. IMC suggests that this evidences simply relaying phone messages to the attorney."

would not need to research various issues, some as basic as "researching the L.S. Act." The Employer also argues that this matter is not as complex as the Claimant's counsel contends. The Employer asserts that success in this claim depends primarily on expert opinion and experience and as a result, Claimant's counsel need not have to spent such an inordinate amount of time researching the medical issues. Additionally, IMC contends that, were it not for the filing of frivolous motions, drafting useless correspondence and making baseless accusations, Claimant's counsel would have had less obstacles to climb. Moreover, Employer maintains that, had Mr. Cortese handled this matter professionally, he would not have run into as many difficulties.

Counsel is entitled to be compensated at a reasonable hourly rate. ***United States Department of Labor v. Triplett,*** 494 U.S. 715, 725 (1988). What is reasonable depends on the issues presented and the state of the law on the subject; the experience and expertise of counsel, presence of factual disputes, and complexity of issues are additional factors to be considered. ***Broyles v. Director, OWCP,*** 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992). The fee applicant has the burden of showing that the claimed hourly rate is reasonable. ***Blum v. Stenson,*** 465 U.S. 886, 897 (1984). Additionally, the party seeking an award of fees should submit evidence supporting the rate claimed. ***Hensley v. Eckerhart,*** 461 U.S. 424, 433 (1983).

In support of the requested $250.00 per hour fee, Mr. Cortese offers that he is an experienced attorney of twenty (20) years, who practices primarily in Workers' Compensation and Longshore litigation. Furthermore, Claimant's counsel asserts that he teaches about two (2) courses a year on workers' compensation and publishes one (1) or two (2) articles per year on workers' compensation. Mr. Cortese also states that he handled his first Longshore case in 1983 and has since handled these cases periodically. In further support, Claimant's counsel attached an affidavit from a case handled by Ray Calafell, an attorney in the Tampa area who has experience in Longshore cases. In the affidavit, Mr. Calafell asserts his usual and customary billing rate, based on his experience, reputation, expertise and economic requirements of his office, is $300.00 per hour. Lastly, Mr. Cortese offers a copy of a Supplemental Order from Judge Jeffrey Turek, wherein he was awarded attorney fees at a rate of $200.00 per hour for his work performed in a previous Longshore case before OALJ.

Mr. Cortese refers to this matter as a "very difficult case" due to Claimant's very serious medical and psychiatric conditions, as well as the complex medical issues, causal issues and multiple legal issues involved. Provided Claimant's condition involves both physical and psychiatric problems, it must not be lost that Claimant's initial work-related injuries were limited to the hip, back, shoulder and neck – none of which I would classify as complex for an experienced attorney of twenty (20) years. And as time went by, Claimant developed psychiatric problems, as outlined above, which would also not be considered a complex problem for a seasoned attorney in Mr. Cortese's field of practice. The only possible complex aspect of this case could be derived by Mr. Cortese's attempt to connect Claimant's ambulation problems with his work-related injuries.[17]

[17] Its possible that the difficulty for Mr. Cortese arose when he fashioned the majority of Claimant's entitlement to medical benefits around a prescription for a jazzy scooter that was

Even then, this is nothing more than the issue of causation which is at the foundation of workers' compensation and longshore cases, which I presume Mr. Cortese has handled throughout his twenty (20) years of practice. Based on the foregoing, I do not consider the legal issues to have been complex.

Having stipulated to permanent, total disability, the Claimant's entitlement to medical benefits, as contained in the Rothman Report, was the only issue left to be resolved at hearing. Mr. Cortese, at hearing called four (4) lay witnesses who testified mainly as to the Claimant's condition. One of the witnesses proffered by Mr. Cortese was a co-worker of the Claimant, Timothy Eustice, who testified as to the physical nature of Mr. Shannon's job with IMC. Having already stipulated to total, permanent disability, one could only wonder what the reasoning was behind Mr. Cortese's decision to put forth such irrelevant testimony. The remaining witnesses called by Mr. Cortese – Mr. Shannon, his wife and his son – testified as to Claimant's condition. However, being that each of these individuals had no formal training in medicine, the testimony offered did little to advance Claimant's case for medical benefits.[18] As a result, the vast majority of the evidence presented at hearing was not crucial, nor relevant to the issues left to be decided. Thus, the effectiveness of Claimant's counsel can certainly be called into question.

Turning to the experience of Claimant's counsel, Mr. Cortese professes to have approximately twenty (20) years of experience handling Workers' Compensation and Longshore cases. Additionally, he provides examples of how he stays active in the area of workers' compensation law. However, Mr. Cortese, often at times, has represented his client in a manner that one would not expect from an experienced trial lawyer. For instance, Claimant's Counsel quite frequently relied on and cited cases in regards to Florida Workers' Compensation law. While there might be similarities to the Florida practice, it is certainly not congruent with the Federal practice before me and is certainly something I wouldn't expect from a seasoned Longshore attorney, which Mr. Cortese suggests that he is.

In addition, Mr. Cortese was overly argumentative and aggressive throughout his client's litigation. There were times where Claimant's counsel had filed a letter/motion in support of an already filed motion before Employer's counsel had a chance to respond to Mr. Cortese's original motion. This very instance occurred after Claimant's counsel submitted his fee petition. After doing so, Mr. Cortese submitted a discovery request for production of documents as they related to the attorney fees for Employer's counsel. And in the subsequent telephone hearing concerning this very discovery request, Mr. Cortese stated that he was prepared to move to compel because the standard procedure in Tampa State Comp is that the bills are just discoverable. Not only does

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written by a psychiatrist, Dr. DeVine. This certainly caught Dr. Kabaria, Claimant's neurologist, by surprise when, on cross-examination, he learned that he endorsed a psychiatrist's prescription for a jazzy scooter.

[18] I must note that the credibility of Mr. and Mrs. Shannon's testimony as to their marital problems aided me in granting benefits for marriage counseling.

the basis for Mr. Cortese's statement lie in the wrong jurisdiction, his shotgun approach is what has made this matter so hotly contested which resulted in multiple filings by the parties at every step of the litigation.

The quality of Mr. Cortese's representation can once again be called into question due to the lack of professionalism he displayed in the August 14, 2002 telephone hearing concerning attorney fees. While arguing his point behind his Motion to Strike, Mr. Cortese unprofessionally and unethically stated "[y]ou know, he's (Claimant) had surgery now for the bypass that was the subject of the trial. The surgery hasn't corrected the low back pain or the right leg pain. There was a full bypass surgery." While I would not and have not let this unprofessional legal tactic influence my decision as to medical causation, I would be remiss if I did not acknowledge Mr. Cortese's inappropriate behavior and not hold it against him. The successfulness of bypass surgery for Claimant's right leg was a controversial sub-issue to the overall causation of Mr. Shannon's right leg pain. To unilaterally refer to the outcome of the subsequent surgery in a light favorable to his client when evidence was no longer being accepted, one can only assume that Mr. Cortese's motive was to inappropriately influence me as to the ultimate outcome of this case. Unfortunately, Mr. Cortese unethical and unprofessionally behavior did not stop with this one instance. In his Amended Petition for Attorney's Fees, Mr. Cortese included a Post-Trial Affidavit of Lila Shannon, Claimant's wife, in Claimant's Exhibit E. The basis of Mrs. Shannon's affidavit was to provide the Court with an update of Claimant's condition following his vascular surgery. Because I never allowed, nor requested the submission of post-hearing evidence from the parties, I did not consider Mrs. Shannon's Post-Trial affidavit. However, I must again note that Mr. Cortese's litigation tactics, such as this, are not entirely ethical.

While I take into account the affidavit of Attorney Calafell and the fact that Mr. Cortese was previously awarded attorney fees at a rate of $200.00 per hour, such evidence must be discounted based his conduct. Furthermore, Mr. Cortese did not display the quality of representation that I would expect from an experienced attorney, let alone one with twenty (20) years of experience in representing individuals in Workers' Compensation and Longshore cases. I am also a Florida lawyer and I have heard dozens of recent Longshore cases in all sectors of Florida that involve attorney's fees. I have awarded fees on an hourly basis upon requests from $125.00 to $250.00 per hour.[19] Comparing Mr. Cortese's work with other lawyers based on the reasons set forth above, he has not proved that he is worth a fee at $200 per hour, and his work compares with inexperienced counsel with one (1) or two (2) years of experience. For example, he did not provide me with Federal case law and often provided me with Florida case law on points that were not appropriate to the law of this case. He did not consider judicial economy in submitting numerous duplicative motions and briefs. For example, he filed his brief prior to the receipt of the transcript in this case, when I had advised him not to do so on the record. Moreover, a review of the medical testimony shows that he failed to fully develop the causation issues regarding the assertions he had made regarding the jazzy scooter. Therefore, I find one hundred twenty-five

[19] My Decision and Orders are all of record and may be found at http://www.oalj.dol.gov/liblhc.htm.

dollars ($125.00) per hour as an acceptable rate for Claimant's counsel's work (Attorney Cortese) in this case.

The Employer also contends that the seventy-five dollar ($75.00) per hour fee requested by Claimant's counsel for services performed by his paralegal is excessive and unreasonable. Therefore, IMC submits that forty-five dollars ($45.00) per hour is fair and reasonable, considering the limited experience Counsel's paralegal has in the area of Longshore and Workers' Compensation.

Claimant's Counsel provides that Lydia Condrey, his paralegal, obtained her Paralegal degree from Segal Institute with a 4.0 grade point average and has since worked for his firm for two (2) and one (1) half years, primarily in longshore and workers' compensation matters. Furthermore, Claimant's Counsel submits that Ms. Condrey has specialized knowledge of medical matters since she worked as a registered nurse for twenty-four (24) years before obtaining her paralegal degree. In his response to the Employer's Opposition to Fee Petition, Mr. Cortese offers that Ms. Condrey's medical knowledge, together with various doctors' medical reports and depositions, allowed him to use the Internet to research complex head injuries and other conditions has, and to develop knowledge in complicated medical issues such as claudication, orthostatic hypotension, cardiovascular blockage, pulmonary insufficiency and other areas.

In the cases questioning the fee for work performed by a paralegal, the administrative law judges consistently found reasonable fees for paralegals, ranging from fifty dollars ($50.00) to seventy-five dollars ($75.00) per hour. *See* ***Richard v. Ingalls Shipbuilding, Inc.,*** 95 LHC 2250 (1999); ***Skidmore v. Newport News Shipbuilding & Dry Dock Co.,*** 97 LHC 2466 (1999); ***Felton v. Norfolk Shipbuilding & Dry Dock Corp.,*** 1999 LHC 00494 (2000); ***Slade v. Newport News Shipbuilding & Dry Dock Co.,*** 98 LHC 2583 (1999); ***Tighe v. Newport News Shipbuilding & Dry Dock Co.,*** 93 LHC 2972 (1999). While there is nothing in the record that would show that seventy-five dollars ($75.00) per hour is not the customary rate for the legal services of Mr. Cortese's paralegal, there is equally nothing in the Claimant's application for attorney's fees that distinguishes Ms. Condrey's work from that of a legal secretary. For this, I conclude that a rate of fifty dollars ($50.00) per hour for paralegal services is reasonable.

As stated above, the Employer also specifically objects to a multitude of Mr. Cortese's itemized entries. They are as follows:

Date	***Time***[20]	***Services***[21]	***Objection***

[20] In hours.

[21] The individual performing such services will be denoted by the abbreviation of his/her name in parenthesis. "AVC" denotes services performed by Anthony V. Cortese, whereas "LHC" indicates services performed by Lydia H. Condrey.

November 19, 2001	1.2	Review Notice of Referral to ALJ, review file, memo to paralegal to set discovery plan (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
November 21, 2001	0.5	Conference with AVC, call from P. Rothman (2), call with Dr. Kaplan (2), send fax to Dr. Kaplan (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
November 26, 2001.	0.3	Review letter from Dr. DeVine, DOL (LHC)	Exceeds the one-eighth (1/8) hour maximum billing limit for reviewing one-page/routine letters.
November 27, 2001	1. 1.3	Review request for production, letter to opposing counsel, call with opposing counsel, conference with counsel, second call from opposing counsel, and call from Claimant's wife (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Paralegal's phone calls with opposing counsel and Claimant's wife are clerical in nature and "there is no indication that these calls were anything other than clerical." "Furthermore, 1.3 hours is an excessive amount to bill for reviewing Requests for Production, particularly in light of the fact that she did not make any attempt to respond to the requests; she simply read over them." The letter to opposing counsel should be reduced/denied because it exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter. Conference with counsel is nothing more than relaying a phone message.
	2. 0.4	Letter to Phyllis Rothman (AVC).	Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
November 28, 2001	1. 1.8	Letter to opposing counsel, call with & letter to Dr. DeVine & Dr. Kabaria & ct. reporter, prepare depo. notice, exhibit A x2, send fax to opposing counsel (LHC)	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. For letters to opposing counsel – "IMC was unable to locate a letter from LHC, dated November 28, 2001. IMC was able to locate a two-sentence enclosure letter dated November 28, 2001, which may have been prepared by Counsel's paralegal. However, IMC submits that an enclosure letter does not aid or assist lead Counsel."
	2. 0.8	Letter to Judge Vittone, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
November 29, 2001	0.4	Call from wife, call with Adjuster, call from Adjustor, call with wife (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Clerical work – "calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim."
December 3, 2001	0.3	Call with ALJ, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Clerical work – "calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim." Conference with counsel is nothing more than relaying a phone message.
December 5, 2001	1.0	Call from P. Rothman (2), review medical report Dr. Kaplan, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message.

December 10, 2001	1. 0.5 2. 0.4	Call from client (2), review letter from opposing counsel, conference with AVC (LHC). Review letter from opposing counsel, review LS-18 (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message. The letter reviewed by the paralegal appears to have also been reviewed by Counsel – this is a double entry. Exceeds the one-eighth (1/8) hour maximum billing limit for reviewing one-page/routine letters.
December 11, 2001	0.2	Call from opposing attorney, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message – routine office work.
December 12, 2001	0.2	Call from wife, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message – routine office work.
December 13, 2001	2.3	Letter to opposing counsel, call with client, letter to opposing counsel on surveillance, research legal (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – "sending multiple letters to counsel on that day." No indication about what "legal" Counsel was researching.
December 17, 2001	2.0	Review interrogatories, request for admissions, request for production, call with wife (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Duplicate entry since 1.3 hours had already been billed on November 27, 2001 to review Requests for Production.
December 19, 2001	1. 1.5	Call from wife, conference with AVC, PV on Lila, research survivor's benefits, review and revise demand, call from client (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message. Time spent researching survivor's benefits unnecessary because they were never at issue and there is no evidence that Ms. Shannon is qualified to write a demand.
December 20, 2001	1. 1.5 2. 1.3	Conference with counsel, research L.S. act, review and revise demand, letter to, send fax to opposing counsel (LHC). Evaluate overall case, memo to file, letter to client (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message. "Research L.S. Act" is vague and fails to specify what aspect of the Act was researched. Review and revise demand is a duplicate entry from day before. Sending a fax is clerical in nature. Insufficient hourly breakdown of hours.
December 27, 2001	0.6	Review court order scheduling order, memo to file (AVC).	Insufficient hourly breakdown of hours.
December 28, 2001	0.5	Review letter from adjuster, P. Rothman (2), review file, letter to Dr. DeVine (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.

January 2, 2002	1. 0.2	Call from opposing attorney (2) (LHC).	Telephone call is clerical work – "calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim."
	2. 0.4	Letter to opposing counsel (AVC).	Exceeds the one-quarter (1/4) hour maximum billing limit for a single page letter.
January 4, 2002	0.1	Conference with AVC (LHC).	Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message.
January 7, 2002	1.0	Call with opposing counsel, draft depo. notice, call from wife, call with adjuster (LHC).	Insufficient hourly breakdown of hours. Telephone calls are clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
January 8, 2002	1. 0.4	Review letter from opposing counsel, call with wife, call with Dr. Khan (LHC).	Insufficient hourly breakdown of hours. Duplicate entry – both counsel and his paralegal billed to review correspondence. Telephone calls are clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
	2. 0.9	Review letter from opposing counsel, review file, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
January 9, 2002	1.6	Call with client's wife, review file to prepare for deposition (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
January 10, 2002	1. 0.4	Call from wife, call from AVC, call with ct. reporter, call with R. Estrada (LHC).	Insufficient hourly breakdown of hours. Telephone calls are clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
	2. 6.4	Review file, travel to Brandon, attend to deposition of Dr. DeVine, return to office, letter to opposing counsel on discovery, letter to opposing counsel on deposition, letter to opposing counsel on doctor's restrictions (AVC).	Insufficient hourly breakdown of hours. Unnecessary and excessive work – sending multiple letters to counsel on that day.
January 11, 2002	1. 0.3	Conference with AVC, call from R. Estrada (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message. Telephone call is clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
	2. 0.8	Letter to opposing counsel, letter to court reporter, letter to opposing counsel (AVC).	Unnecessary and excessive work – sending multiple letters to counsel on that day.

January 14, 2002	0.5	Conference with AVC (LHC).	Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message which is purely clerical.
January 15, 2002	1. 1.0	Draft depo. notice + exhibit A, letter to opposing counsel, call with ct. reporter (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone call is clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
	2. 1.1	Review letter from opposing counsel, letter to Ric Estrada, letter to opposing counsel (AVC).	Unnecessary and excessive work – "He (Claimant's counsel) wrote two letters and reviewed one."
January 16, 2002	0.2	Memo to paralegal on investigation (AVC).	Insufficient specificity of the extent and character of the necessary work performed. Unnecessary interoffice correspondence.
January 17, 2002	0.8	Review and revise depo. Dr. DeVine, call with wife (2), call from opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Clarification of review and revise billing – paralegal could not revise Dr. DeVine's deposition. Telephone calls are clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
January 18, 2002	2.0	Conference with AVC, call with Dr. Martinez, call with Dr. Kabaria, prepare depo. notice x2, call with ct. reporter, call with opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is nothing more than relaying a phone message which is purely clerical.
January 22, 2002	2.0	Call with Dr. DeVine, ct. reporter, prepare depo. notice, call from wife, letter to ALT + DOL, call from opposing counsel, review fax from opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical work – calls should be denied unless Counsel provides supporting facts showing that the phone calls made by the paralegal contributed to the successful prosecution of the claim.
January 23, 2002	0.3	Letter to opposing counsel (AVC).	Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
January 24, 2002	0.3	Letter to opposing counsel (AVC).	Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
January 25, 2002	1. 4.0	Conference with AVC, prepare depo. notice x7, letter to client, call from opposing counsel (LHC).	Insufficient hourly breakdown of hours. Conference with counsel is nothing more than relaying a phone message which is purely clerical. Telephone call is clerical work.
	2. 0.3	Conference with AVC, memo to file (LHC).	Conference with counsel and memo to file are both unbillable interoffice correspondence.
	3. 0.3	Letter to opposing counsel (AVC).	Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter. Unnecessary and excessive work.

January 28, 2002	1. 0.4 2. 0.6	Call from client, call with adjuster, call from adjuster, call with client (LHC). Letter to opposing counsel scheduling depositions, letter to opposing counsel IMC deposition (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical work. Insufficient hourly breakdown of hours. Unnecessary and excessive work – multiple letters to opposing counsel on one day.
January 29, 2002	2.4	Review file discovery requests, draft reply to request for production, letter to client, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
February 5, 2002	0.9	Review letter from Ric Estrada, review file, memo to client (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
February 6, 2002	0.5	Call with Dr. Abrams, call with client, conference with Larry +wife for answers to interrogatories (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
February 7, 2002	2.9	Review file, call with client to discuss answers to interrogatories and draft set (AVC).	Insufficient hourly breakdown of hours.
February 12, 2002	1. 0.1 2. 0.2	Call from opposing counsel (LHC). Call from voc. counselor, call with client (LHC).	Telephone call is clerical work. Telephone calls are clerical work.
February 14, 2002	0.3	Letter to opposing counsel (AVC).	IMC is unable to locate a letter from Counsel dated February 14, 2002.
February 15, 2002	1.6	Review and revise answers to interrogatories, letter to opposing counsel, letter to client, review file to request for production (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
February 18, 2002	1.0	Review request for production of documents (LHC).	Duplicate entry, especially in light of the fact that Counsel had also reviewed the Requests for Production on 2/15/02.
February 20, 2002	0.8	Letter to opposing counsel on mediation, letter to opposing counsel on deposition (AVC).	Insufficient hourly breakdown of hours. Unnecessary and excessive work – multiple letters to opposing counsel on one day. Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
February 28, 2002	0.2	Call with adjuster, send fax to adjuster (LHC).	Insufficient hourly breakdown of hours. Telephone call and fax are clerical.
March 7, 2002	1. 0.8 2. 3.6	Conference with client + R. Estrada, memo to file, call from DOL-Nashville (LHC). Conference with R. Estrada and L. Shannon, review documentation from opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Clerical work. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.

March 8, 2002	0.1	Letter to R. Estrada (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Letter should be denied unless Counsel provides supporting facts showing that the letter contributed to the successful prosecution of the claim.
March 12, 2002	1. 0.3 2. 0.3	Review pleading from, conference with AVC (LHC). Letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference with counsel is clerical. IMC has not been able to locate a letter from Counsel bearing this date.
March 13, 2002	0.3	Call from wife, review pleading from (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed – clarify pleading reviewed. Telephone call is clerical.
March 15, 2002	2.8	Motion for protective order on neuropsychological testing, letter to opposing counsel on hospitalization (AVC).	Insufficient hourly breakdown of hours. Motion for protective order was meritless. "As fully explained in counsel's reply to that Motion, undersigned had asked the neuropsychologist to tailor the examination to fit Claimant's needs. Counsel refused to negotiate, opting instead to file the motion. Outcome was exactly what IMC offered – an examination within his doctor's restrictions."
March 19, 2002	1. 0.2 2. 6.8	Conference with AVC (LHC). Review motion for protective order on adjuster, research caselaws, research FRCP rules, draft reply to motion, research CFR, draft memo opposing testing, letter to judge (AVC).	Conference with counsel is clerical. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
March 20, 2002	1. 0.5 2. 4.0	Call from ALJ (2), review fax from ALJ, call from wife, call with adjuster (LHC). Review and revise reply to motion, review and revise memo on testing, draft requests for admissions, interrogatories and requests for production (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Duplicate billing – Counsel billed for time spent preparing discovery on March 21 as well.
March 21, 2002	0.6	Review and revise discovery requests, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Duplicative billing – Counsel billed for time spent preparing discovery on the previous day. Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
March 22, 2002	0.8	Conference with clerk on doctor test, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.

March 23, 2002	1. 0.6	Conference with AVC, call with opposing counsel, letter to opposing counsel, call from wife, send fax to opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls, fax and conference are clerical.
	2. 1.0	Conference with AVC, call with wife, call with Tymisis, call with Dr. Kabaria's office, call with Dr. Nagaria, send fax to Dr. Nagaria, review medical report Combi, letter to opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls, fax and conference are clerical. IMC is unable to locate a second letter from the paralegal.
March 24, 2002	1.5	Conference with AVC, call from wife, review and revise requests for production, request for admissions, interrogatories, depo. notice x2, exhibit A (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone call and conference are clerical. Discovery work is duplicate. "Counsel previously billed for this service on March 22, 2002, and then forwarded the requests to undersigned."
March 25, 2002	1.3	Calls to and from wife, call with Tynsis, conference with Lisette, review memo from Tony, review medical report all (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical. "IMC does not know who Lisette is, why she met with the paralegal, or what the conference was about."
March 26, 2002	1. 1.0	Call from wife, review and revise response to motion, research CFR 702.410 + CFR 702.411 (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Duplicate billing for revising response to motion as well as research.
	2. 2.4	Letter to opposing counsel, review reply to counsel on discovery, research caselaw for hearing, letter to opposing counsel on rehab (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – sending multiple letters to counsel on that day. Entries for research are vague. Research is duplicate since Counsel researched this issue before filing the motion.
March 27, 2002	1. 0.8	Conference with AVC, call with client, call from wife, letter to ALJ (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls and conference are clerical. Exceeds the one-quarter (1/4) hour maximum billing limit for drafting a single page letter.
	2. 2.9	Review file, attend motion hearing, letter to opposing counsel on IME, call with opposing counsel on deposition dates (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.

April 1, 2002	1. 0.6	Call from wife (2), Dr. Abrams office, calls to and from R. Estrada (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical.
	2. 0.8	Review fax from opp. counsel, letter to client (2), call with R. Estrada, call with (2) + letter to Dr. Martinez's office, call from opposing attorney, call with + send fax to Dr. Masculco (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls and sending faxes are clerical.
	3. 1.2	Letter to opposing counsel, letter to Dr. Mascaro (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. IMC does not know why Dr. Mascaro was consulted or what input he had on this case. Unnecessary and excessive work – "Counsel sent 7 short faxes to undersigned, with the correspondence in the "message" section of the cover sheet. [Instead], he should have sent one letter."
April 2, 2002	1. 2.5	Prepare depo. notice, exhibit A, letter to opposing counsel, research myelogram results, review medical report all medicals (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
	2. 0.8	Letter to opposing counsel, letter to Dr. Patterson, letter to client, letter to opposing counsel on discovery items (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – sending two letters on one day.
April 3, 2002	1. 0.6	Call from R. Estrada, review voc. report, call from choice process (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical "in the absence of additional information."
	2. 2.9	Letter to Dr. Martinez, letter to opposing counsel, letter to Ric Estrada, review file to prepare for trip to New Orleans (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 4, 2002	1. 0.3	Call from choice process, USDOL, call from wife (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical "in the absence of additional information."
	2. 5.0	Travel to New Orleans (½ time), call with client (multiple), call with opposing counsel (multiple) (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Work was unnecessary – "adjuster's deposition was a complete waste of time and money and should not have been taken as she had no testimony relevant to any issues in the case."

April 5, 2002	1. 0.6	Review file, send fax to N.O. x5, call with DOL (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Sending fax is clerical.
	2. 6.6	Review file to prepare questions for adjuster, attend deposition of adjuster, memo to file (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Work was unnecessary – "adjuster's deposition was a complete waste of time and money and should not have been taken as she had no testimony relevant to any issues in the case."
April 8, 2002	1. 0.4	Conference with AVC, call with wife, call with opposing counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 1.6	Call with client, review file on psychiatric records, review notes of Dr. DeVine deposition (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 9, 2002	1. 1.0	Call with opposing counsel, conference with AVC, call with wife, call from ct. reporter (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 5.6	Letter to opposing counsel, travel to Brandon, attend deposition of Dr. DeVine, return to office, memo to file, letter to opposing counsel on discovery, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 10, 2002	1. 0.4	Call from DOL, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 8.0	Review file for client's deposition, travel to Wimauma, conference with client and wife, attend deposition of client and wife (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 11, 2002	1. 0.8	Conference with AVC, review surveillance, calls to and from wife (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 7.2	Review file for deposition of IMC, travel to Mulberry, attend deposition of C. Nethercutt, return to office, memo to file, letter to client, review report of Ric Estrada, letter to opposing counsel on Estrada report, review letter from opposing counsel, call with Ric Estrada (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.

April 12, 2002	1. 1.2	Conference with AVC, review fax from client, call from wife, call from R. Estrada, letter to opposing counsel, call from + letter to Sierra const., letter to client, call with A. Ability (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 0.6	Letter to opposing counsel scooter and lift estimates, letter to opposing counsel on Dr. Rosemurgy records, letter to opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 15, 2002	1. 1.2	Call from wife, call with opposing counsel (2), call with Dr. Kabaria (2), letter to Dr. Matinez, R. Estrada (2), letter to opposing counsel, send fax to opp. counsel, Dr. Kabaria, ct. reporter (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
	2. 0.8	Review file, memo to paralegal on cardiology record (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 16, 2002	0.6	Letter to opposing counsel on Dr. Saunders and Dr. Patterson, Letter to opposing counsel on PTD, letter to Dr. Patterson (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 17, 2002	0.6	Call with client, call with Dr. Nagaria's office, review fax from opp. counsel, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
April 18, 2002	1. 1.0	Call from + letter to + send fax to Dr. Nagamia's office, review medical report Dr. Nagamia, review file, draft stipulations, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 0.3	Call from Ct. Reporter, call from wife, call with Dr. Martinez's (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
	3 .2.9	Prepare Motion for Protective Order, letter to opposing counsel on IME, letter to opposing counsel on discovery, letter to opposing counsel with stipulations (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Work was unnecessary – "Motion for Protective Order was frivolous, being that it sought a protective order unless undersigned provided written notice that Claimant's wife could attend a medical examination with him. Apparently, Counsel held this motion for several weeks, because it was not until May 6, 2002 that Counsel faxed a copy to undersigned, requesting said written notice; and if undersigned did not respond in writing, he would be forced to file the Motion for Protective Order that day, and ask that it be heard the following day, with other pending motions. As soon as practical, undersigned faxed to Counsel written confirmation that Claimant's wife could attend the medical examination. On May 7, 2002, Counsel withdrew his request, advising the Court that the issue was moot."

April 19, 2002	1. 0.8	Calls to and from wife, call from ct. reporter, review medical report Dr. Martinez, review letter from adjuster (2), letter to client.	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
	2. 6.0	Review letter from opposing counsel, letter to R. Estrada, review letter from opposing counsel Dr. Eichberg, IME, review videotapes, letter to opposing counsel on 3rd videotape, review letter from opposing counsel with replies to requests for admissions (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 22, 2002	1. 1.4	Review and revise pretrial stip., letter to ALJ, call from opposing attorney, call with R. Estrada (2), call with opposing counsel, send fax to ALJ + opp. counsel, review fax from opp. counsel (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls and sending faxes are clerical unless it can be established that they assisted with this claim.
	2. 6.0	Letter to opposing counsel on continuance, letter to opposing counsel on IME, letter to opposing counsel on video, letter to opposing counsel on depositions, review letter from opposing counsel, letter to opposing counsel on deposition dates, draft prehearing statement with witness list and exhibit list (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – sending four separate letters to opposing counsel on one day.
April 23, 2002	1.5	Review letter from opposing counsel (2), call with opposing counsel, review surveillance tape, review file, call from opposing attorney, call with office Dr. Nagami, K. Denick, call from K. Denick (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical unless it can be established that they assisted with this claim. Duplicate entry – paralegal billed a second time for reviewing the surveillance tape.
April 24, 2002	0.9	Letter to opposing counsel on depositions, letter to opposing counsel on Dr. Anderson, letter to opposing counsel on testing (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – sending three separate letters to opposing counsel on one day.

April 25, 2002	1. 0.6 2. 6.1	Call from wife, call with Tymsis, call with Walgreens, call from Dr. Martinez's office, conference with AVC, call with client (LHC). Call with court clerk, draft motion in limine on Dr. Saunders, draft motion for summary judgment on PTD issue (first draft) (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls and conference are clerical unless it can be established that they assisted with this claim. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Work drafting baseless motions was unnecessary. "The Motion for Summary Judgment sought to have the Court recognize that IMC did not offer suitable alternate employment to Claimant, thereby establishing that Claimant was totally disabled and shifting the burden to the employer to show suitable alternate employment. As noted in IMC's opposition, this is accomplished as a matter of law." "The time spent preparing the Motion in Limine should be denied since Counsel's request was denied on the morning of trial, with the Court accepting the transcript of his deposition testimony into evidence with very little discussion on the issue."
April 26, 2002	1. 0.6 2. 0.3 3. 2.6	Call with Walgreens, call with client, call with Ct. reporter, review medical report Dr. Martinez (LHC). Conference with AVC (LHC). Review order of court, letter to opposing counsel on Dr. Martinez progress notes, review answers to interrogatories, review E/C prehearing statement, review reply to request for documents (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical. Conference is clerical. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
April 29, 2002	1. 1.0 2. 4.0	Review letter from opposing counsel, review pleading from X2, call from opposing attorney, calls to and from Dr. Abrams office, conference with AVC (LHC). Research caselaw on support of motion for summary judgment, travel to court library on FRCP, research federal cases on motion (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical. Insufficient hourly breakdown of hours. Work researching was unnecessary. Research entries should be denied since "it appears that Counsel researched the law on his Motion for Summary Judgment after he prepared his Motion. He performed the research on April 29th; however, the Motion was prepared on the 25th."

April 30, 2002	1. 1.0 2. 8.0	Research Dr. Messina, prepare medical release authorizations (2), call with client, call from R. Estrada, call from ct. reporter (LHC). Review letter from opposing counsel, call with client, letter to client, review letter from motion for protective order, review file materials and medical records, preparation for deposition of Dr. Martinez, preparation for deposition of Ric. Estrada, travel to Dr. Martinez, return to office, attend deposition of Ric Estrada, memo to file (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls are clerical. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
May 1, 2002	1. 0.4 2. 6.0	Review fax from opp. counsel, letter to client, call from wife (LHC). Review file to obtain documents for motion for summary judgment, review and revise motion for summary judgment (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Removal of faxing correspondence is clerical. Insufficient hourly breakdown of hours. Work associated with motion for summary judgment was unnecessary.
May 2, 2002	1. 1.5 2. 4.0	Call from + review fax from Judges office, send fax to Dr. Abrams office, review medical report Naplan, Rosemurgy, Graves, Combi, Frankle, Kabaria (LHC). Letter to opposing counsel on Dr. Saunders IME, review notice of ct. of hearing, conference with client, attend IME with client and Dr. Eichberg, review letter from opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
May 4, 2002	4.2	Review letter from opposing counsel, travel to county library, research caselaw, return to office (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed – clarify the issues researched.
May 6, 2002	1. 1.2 2. 2.6	Review depo. of Lila + Larry Shannon, call with client, conference with AVC (LHC). Draft motion for protective order on Dr. Saunders with caselaw from county library, review letter from opposing counsel Dr. Saunders, review letter from opposing counsel on items, review letter from opposing counsel on OSHA and discovery (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical. Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Duplicate entry – "Counsel alleges that he drafted the Motion for Protective Order regarding Dr. Saunders, incorporating recent research."

May 7, 2002	1. 0.4	Call with opposing counsel, call with client, memo to file (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls and memo are clerical unless it can be established that they assisted Counsel in this case.
	2. 3.6	Letter to court, call with court clerk, review letter from opposing counsel, letter to opposing counsel on letter, letter to opposing counsel on depositions and IME, review all medical records in file and opposing counsel (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
May 8, 2002	1. 1.0	Send fax to opp. counsel, review fax from opp. counsel, call with opposing counsel, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone calls, conference and time spent faxing are clerical.
	2. 4.2	Call with opposing counsel, review file on cardiac and vascular problems, review internet research, review psychiatric records and deposition (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed.
May 9, 2002	1. 1.2	Review medical report Dr. Eichberg, research brain trauma-Parkinsons (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Vagueness – time spent performing "medical research fails to specify her resources or authorities."
	2. 8.3	Review letter from opposing counsel and report of Dr. Eichberg, draft motion for protective order, letter to judge, travel to Brandon, attend deposition of Dr. Nagamia, return to office, travel to USF, attend IME with Dr. Saunders, return to office (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Time spent on reference Motion for Protective Order needs to be clarified; otherwise, it was unnecessary since it was meritless. Letter to opposing counsel should not exceed the one-quarter (1/4) hour maximum billing limit for drafting a single page letter. Reviewing an enclosure letter should not exceed the one-eighth (1/8) hour maximum billing limit for reviewing one-page/routine letters.
May 13, 2002	8.0	Review file to prepare for hearing, letter to Judge to request subpoenas, letter to opposing counsel on report of Dr. Saunders, letter to Judge on motion for protective order, review internet research on hypotension and other items of Dr. Eichberg, preparation for deposition of Dr. Eichberg, attend deposition of Dr. Eichberg, return to office, letter to opposing counsel (2) (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Letters to opposing counsel should not exceed the one-quarter (1/4) hour maximum billing limit for a single page letter. Unnecessary and excessive work – sending two separate letters to opposing counsel on one day.

May 14, 2002	1. 0.6	Conference with AVC, WCC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Conference is clerical.
	2. 6.0	Call with client, letter to opposing counsel on depositions, letter to opposing counsel on Dr. Saunders, letter to opposing counsel on continuance, call with opposing counsel on issues and exhibits, travel to Wimauma, conference with client, attend deposition of client, return to office, memo to file (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Unnecessary and excessive work – sending three separate letters to opposing counsel on one day.
May 15, 2002	1. 0.8	Call with opposing counsel, review fax from opposing counsel, conference with AVC (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Telephone call and conference is clerical. Reviewing letter should not exceed the one-eighth (1/8) hour maximum billing limit for reviewing one-page/routine letters.
	2. 3.0	Research neuropsychological testing, Alan Saunders, review fax from opp. counsel, attend hearing, conference with AVC, review medical report Dr. Saunders, call with ct. reporter (LHC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. "Time spent researching medical issues should be reduced because it is virtually impossible to tell what her focus is when she refers to 'research neuropsychological testing.' She fails to identify her sources and provide additional information about her research."
	3. 2.6	Letter to opposing counsel on Dr. Saunders report, letter to opposing counsel on PTD letter, review file to prepare for hearing, letter to opposing counsel, review letter from opposing counsel and reply on motions, research for hearing (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Time spent conducting 'research' is vague.
May 16, 2002	2.0	Review letter from opposing counsel, attend hearing on motions and PTD status, memo to file, letter to client (AVC).	Insufficient hourly breakdown of hours. Insufficient specificity of the extent and character of the necessary work performed. Time "should be reduced, particularly since he received confirmation of IMC's acceptance of permanent and total status on that date."

Clerical Work

The Employer contends that much of the paralegal's work is clerical in nature. Specifically, IMC asserts that a review of Ms. Condrey's entries show that she often spoke with individuals and then had a conference with the lead attorney. By doing this, the Employer suggests that Mr. Cortese's paralegal is simply relaying phone messages to the attorney. Therefore, the Employer objects to all interoffice conferences between Claimant's counsel and his paralegal. IMC further objects to many of the paralegal's entries as being insufficiently described as to the nature of the work performed. Thus, IMC requests that the Court reduce the time sought for Mr. Cortese's paralegal.

In response, Claimant's counsel contends that his office has a full-time secretary and two full-time assistants who handle clerical tasks, dictation of counsel, filing, file organization and phone calls of a clerical nature. Additionally, Mr. Cortese claims that the phone calls taken from clients, counsel, experts and others are to obtain or input important information to the progression of the case.

Work by a law clerk, paralegal, or lay person may be recoverable but only if performed "in aid of or in association with the supervising attorney on this claim." ***Todd Shipyards Corp. v. Director, OWCP,*** 545 F.2d 1176 (9th Cir. 1976). Time spent on traditional clerical duties is not compensable and cannot be included as part of the attorney's reported number of hours. ***Staffile v. Int'l Terminal Operating Co.,*** Inc., 12 BRBS 895 (1980). On October 9, 2002, I ordered Claimant's counsel to specifically clarify and describe the nature of his paralegal's phone calls and conferences with sufficient detail as to be clearly identifiable as necessary, compensable work. Upon receipt and review of Claimant's Amended Petition for Attorney's Fees, I am again left to speculate as to whether these entries for Mr. Cortese's paralegal are purely clerical work or work which led to the progression of Claimant's case. Because the Claimant's counsel, on two (2) occasions, has failed to delineate the nature of his paralegal's work which has been called into question, I am left to conclude that the telephone calls and interoffice conferences are traditional clerical duties. Therefore, the time spent making telephone calls, sending faxes and conferencing with Mr. Cortese is not compensable, and as a result, Ms. Condrey's billable hours will be reduced by 20.55 hours.

Clumped Entries

The Employer objects to all clumped entries in Claimant's fee petition, and requests that any award be withheld until Mr. Cortese submits a fee petition with each activity individually listed. Specifically, IMC asserts that such entries contain unrelated, clearly distinguish activities listed together, and billed under lump amount of time. Therefore, Employer argues that it is unacceptable to clump services together, leaving one to guess precisely how much time was allotted to each particular task. Claimant's counsel defended his billing approach by acknowledging that his office utilizes a Timeslips Computer Program for billing purposes, which takes individual daily activities and lumps them together thereby producing a large entry for an individual's multiple daily tasks.

Among other things, the regulations require that a fee application must be supported by ... an hourly breakdown of the time spent in the particular activity.... *See* ***Nacirema Operating Co. v. Lynn,*** 577 F.2d 852 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); ***Newport News Shipbuilding & Dry Dock Co. v. Graham,*** 573 F.2d 167 (4th Cir. 1976), *cert. denied*, 439 U.S. 979 (1978); ***Ayers Steamship Co. v. Bryant,*** 544 F.2d 812 (5th Cir. 1977); ***Matthews v. Walter,*** 512 F.2d 941 (D.C. Cir. 1975); ***Forlong v. American Sec. & Trust Co.,*** 21 BRBS 155 (1988). Because Claimant's counsel failed to provide a proper hourly breakdown of time spent for each particular activity, I ordered him to identify the proper amount of time spent working on an individual activity for each billable day. Mr. Cortese's Amended Fee Petition is in compliance with this order as it relates to the breakdown for his billable hours. However, Mr. Cortese failed to do the same for his paralegal's individual daily activities, which remain clumped together in

Claimant's Amended Fee Petition. As a result, I am left to speculate as to whether Ms. Condrey's clumped entries are a reasonable portrayal of her time spent on each individual activity.

Because Claimant's counsel has failed to comply with the regulatory requirements for submitting a fee application as it relates to his paralegal's entries, I could strike all of his paralegal's clumped entries. Rather, I find that Ms. Condrey's billable hours will be reduced by 10.0 hours to more accurately reflect her time spent on such activities.

Compensable Services

An attorney is entitled to compensation for all necessary work performed. The proper test for determining if the attorney's work is necessary is whether, at the time the attorney performs the work in question, the attorney could reasonably regard the work as necessary to establish entitlement. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981); ***Cherry v. Newport News Shipbuilding & Dry Dock Co.,*** 8 BRBS 857 (1978). *See* ***Battle v. A.J. Ellis Constr. Co.,*** 16 BRBS 329 (1984) (unsuccessful settlement negotiations held compensable under this standard); ***Berkstresser v. Washington Metro. Area Transit Auth.,*** 16 BRBS 231 (1984) (time spent reading a memorandum compensable even though it ultimately had no bearing on the outcome). The Board has disallowed fees for entries which are unnecessary, excessive, or duplicative. ***Edwards v. Todd Shipbuilding Corp.,*** 25 BRBS 49 (1991) (the Board reduced the number of hours for telephone calls as they constituted over one-half of all hours billed); ***Gardner v. Railco Multi Constr. Co.,*** 19 BRBS 238 (1987).

Routine Correspondence

The Employer objects to an abundance of Mr. Cortese's individual entries. IMC first objects to the amount of time Claimant's counsel billed for drafting and reviewing one (1) page and/or routine letters. The Employer contends that preparing such routine correspondence should not exceed .25 hours, whereas reviewing such correspondence should not exceed .125 hours. The Employer cites various entries whereby by Claimant's counsel exceeds such billing constraints and requests that they be reduced accordingly.[22] In response, Claimant's counsel argues that "we normally bill .10 to .30 [hours] for a one-page letter ...." Mr. Cortese further argues that the letters were almost "never routine."

The Board, in ***Bullock v. Ingalls Shipbuilding, Inc.,*** 29 BRBS 131 (1995), held that a claimant's attorney cannot charge more than 1/8 of an hour to review a single page letter and 1/4 of an hour to draft a single page letter. While the majority of Mr. Cortese's drafting of correspondence is billed at .30 hours, it is still above the maximum that one can bill for routine correspondence. As a result, Mr. Cortese's billable hours will be reduced by 1.90 hours to more accurately reflect his time spent preparing/reviewing routine correspondence. Additionally, the billable hours for Mr.

[22] With regards to drafting letters, IMC objects to Mr. Cortese's entries for the following dates: November 27 and 28, 2001; January 2, 15, 23, 24, and 25, 2002; February 14 and 20, 2002; March 12 and 21, 2002; April 1, 2002; and May 13, 2002. With regards to reviewing correspondence, IMC objects to Mr. Cortese's entries for the following dates: November 26, 2001; December 10, 2001; and May 9 and 15, 2002.

Cortese's paralegal will be reduced by .35 hours to more accurately reflect her time spent preparing/reviewing routine correspondence.

Duplicate Entries

IMC objects to various entries as being duplicate wherein Mr. Cortese and his paralegal billed for the same work. Employer first objects to the paralegal's entry for December 10, 2001 where she reviewed a letter from opposing counsel. Being that Mr. Cortese also reviewed the letter on December 10, 2001, IMC argues that this is a double entry which should be stricken. Claimant's counsel asserts that his paralegal's time entry of .50 for that day is adequate to support the entry without the review of correspondence. Mr. Cortese thus acknowledges that the paralegal's December 10, 2001 entry is duplicative of work he performed on such date. While its possible that his paralegal's time for such date is indeed adequate without including her review of the subject correspondence, Mr. Cortese hampers my ability to make such a determination due to the clumped billing which is utilized for Ms. Condrey's billable time. As a result, Ms. Condrey's billable hours will be reduced by .15 hours to more accurately reflect her time spent on such activities.

IMC next objects to the paralegal's December 17, 2001 entry wherein she reviewed all discovery sent by the Employer. Since the paralegal billed for review of Requests for Production on November 27, 2001, the Employer contends that this entry is duplicative and should be reduced. Claimant's counsel failed to offer a counter argument in his reply. As a result, a portion of the paralegal's time on December 17, 2001 is considered duplicate work since she had already billed for work on requests for production on November 27, 2001. Therefore, Ms. Condrey's billable hours will be reduced by .60 hours.

The Employer objects to the research performed by the paralegal on December 20, 2001. IMC argues that such entry is duplicative of the research performed the previous day. Claimant's counsel failed to offer a counter argument in his reply. For this reason, it would follow that the work performed on December 20, 2001 by Mr. Cortese's paralegal was duplicative of the work performed the previous day. As such, Ms. Condrey's billable hours will be reduced by .50 hours.

IMC next objects to the paralegal's entry for January 8, 2002 wherein reviewed a letter from opposing counsel. The Employer contends that such work is duplicative being that Mr. Cortese, himself, reviewed the same letter on that day. Claimant's counsel failed to offer a counter argument in his reply. Therefore, I can only assume that the work called into question is duplicative of Mr. Cortese's. Thus, Ms. Condrey's billable hours will be reduced by .20 hours.

Employer objects to the paralegal's entry for her review of Employer/Carrier's Request for Production of documents on February 18, 2002. IMC requests that this duplicate entry be struck being that it is the third time counsel's paralegal billed for review of its Request for Production of documents. Claimant's counsel failed to offer a counter argument in his reply. Based on what's before me, I find the paralegal's review of IMC's Request for Production on February 18, 2002 to

be duplicative of her previous reviews. Therefore, Ms. Condrey's billable hours will be reduced by .70 hours to more accurately reflect her time on such date.

Employer objects to Mr. Cortese's entries for work performed on March 20 and 21, 2002. IMC first contends that the time spent reviewing and revising Claimant's Reply to Travelers' Motion for Protective Order is out of line and duplicative seeing that Mr. Cortese spent nearly seven (7) hours drafting a reply the previous day. Secondly, IMC objects to Mr. Cortese's time spent reviewing and revising discovery requests on March 21, 2002 since he spent three (3) hours the previous day working on such discovery requests. In response, Claimant's counsel advises that the issues regarding the March 20th entry were extensive and difficult to find. Additionally, Mr. Cortese argues that the requests for admissions were being evaluated to set up a motion for summary judgment. While I do not find Mr. Cortese's review and revision of Claimant's Reply to the Motion for Protective Order to be duplicative, I do find his March 21, 2002 review and revision of discovery requests to be duplicative of his revision performed the previous day. Therefore, Mr. Cortese's billable hours will be reduced by .30 hours to more accurately reflect his time on such date.

IMC next objects to the paralegal's work performed on March 23, 2002 which includes two (2) entries for letter to opposing counsel. The Employer argues that it has been unable to locate a second letter from the paralegal, and unless Claimant's counsel can substantiate that a second letter was indeed sent, time spent on the second letter should be stricken. Claimant's counsel failed to offer a counter argument in his reply. As a result, I find the paralegal's entry for a second letter to opposing to be duplicative of the first letter sent on March 23, 2002. Thus, Ms. Condrey's billable hours will be reduced by .20 hours to more accurately reflect her time on such date.

Employer also objects to the paralegal's entry for March 24, 2002 where she billed for reviewing and revising Claimant's discovery requests. IMC argues that such entry is duplicative since counsel previously billed for this service on March 22, 2002, and then forwarded the requests to the Employer's counsel. Claimant's counsel failed to offer a counter argument in his reply. I accept the Employer's argument being that the file includes Claimant's First Set of Interrogatories, Request for Admissions and Request to Produce Documents, along with a cover letter dated March 21, 2002. Having sent out the discovery requests on March 21, 2002, it would be difficult for Mr. Cortese's paralegal to review and revise such requests the following day. As such, Ms. Condrey's billable hours will be reduced by .60 hours to more accurately reflect her time on such date.

Employer objects to the entry for April 23, 2002 wherein the paralegal billed for reviewing surveillance tape. IMC argues that this is the second time counsel's paralegal, herself, reviewed the surveillance, making it a duplicate entry. Alternatively, Claimant's counsel asserts that there were three (3) separate videotapes that opposing counsel turned over at separate times. Thus, the paralegal was billing for different events. I accept Mr. Cortese's argument and do not find the time spent by Ms. Condrey on April 23, 2002 to be duplicative.

Lastly, Employer objects to Mr. Cortese's time spent drafting a motion for protective order on May 6, 2002. Counsel for the Employer asserts that such entry should be reduced on the grounds that it is duplicative. While Claimant's counsel has not offered a counter argument in support of his May 6th billing, the file contains two (2) varying Motions for Protective Order – Claimant's Motion for Protective Order from Evaluation with Dr. Saunders and Claimant's Motion for Protective Order regarding the Scheduled Deposition of Dr. Saunders. For these reasons, I do not find the time spent by Mr. Cortese on May 6, 2002 to be duplicative.

Based on the foregoing reasons, Mr. Cortese's billable hours will be reduced by .30 hours for duplicate entries. Additionally, the billable hours for Mr. Cortese's paralegal will be reduced by 2.95 hours for her duplicate entries.

Vague Entries

The Employer contends that Counsel's fee petition is full of vague entries, making it impossible to determine what he is doing. As such, IMC requested that I withhold any award until Counsel clarifies his fee petition and specifies what work he was doing. Counsel for the Claimant argues that the inexpensive timeslips system he employs produces these 'so-called' vague entries; however, it is not a system that he's created, but one that effective for a small practice such as his.

For the most part, Mr. Cortese has sufficiently explained the work behind the entries that the Employer had objected to as vague. However, there are a few entries for which Claimant's counsel has not responded to in either his Reply in Defense of Fee Petition or his Amended Petition for Attorney's Fees. Essentially, Employer objects to the vagueness for the entries involving legal research. For example, IMC objects to Mr. Cortese's March 26, 2002 entries depicted as 'research caselaw for hearing' and 'research CFR 702.410 + CFR 702.411.' While such entries are not full of specific detail, one could deduce the relativity for which the research was used towards. For example, the March 26th entry, titled 'research caselaw for hearing' would leave one to believe that it dealt with the issues to be discussed at the March 27, 2002 telephone hearing. As a result, I do not find Counsel's entries dealing with research[23] to be vague. Therefore, such entries are deemed compensable services.

Excessive Work

The Employer objects to Mr. Cortese's practice of drafting and sending multiple letters per day to opposing counsel.[24] Attorney for the Employer argues that opposing counsel could have prepared

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[23] The Employer objected to the following entries as vague: December 20, 2001; March 13 and 26, 2002; and May 4, 9, and 15, 2002.

[24] IMC objects to the following entries wherein Claimant's counsel drafted and sent multiple letters to Employer: .80 hours on December 13, 2001 for two letters to opposing counsel; .80 hours on January 10, 2002 for three letters to opposing counsel; .60 hours on January 11, 2002 for two letters to opposing counsel; .60 hours on January 28, 2002 for two letters to opposing counsel; .80 hours on February 20, 2002 for two letters to opposing counsel;

a single letter per day, rather than taking the time to send two (2) and sometimes three (3) letters a day. IMC requests the Court to reduce the time entered on such dates due to Counsel's overly excessive practice of sending multiple letters per day.

In support of his practice, Claimant's counsel argues that since the litigation was intense and fast-moving, issues developed quickly. And as a result, correspondence was completed as these issues arose, but the words were carefully chosen and revised, to be sure opposing counsel could not misinterpret them. Mr. Cortese further argues that since the issues were often complex, sometimes a separate letter would sometimes be sent intentionally. Moreover, Claimant's counsel asserts that the time it takes to send three (3) letters on separate issues is not much different from the time it takes to send one (1) longer letter. Lastly, Mr. Cortese offers that these separate letters were just dictated at different times, and once a letter is dictated, it is faster to simply revise it and get it out than to try to amend it to add a new subject.

As alluded to above, the Board has disallowed fees for entries which are unnecessary, excessive, or duplicative. ***Edwards v. Todd Shipbuilding Corp.,*** 25 BRBS 49 (1991). While I don't doubt that there were many issues that arose in this case, I find it hard to believe that it was to the point where Claimant's counsel needed to send five (5) separate letters to opposing counsel on a given day, as he did on April 22, 2002. Moreover, I do not agree with Cortese's belief that sending three (3) letters on separate issues is not much different than sending one (1) long letter. Such a rapid fire approach to litigation is a major reason why there were too many disputes throughout this case, as Mr. Cortese claims. If Claimant's counsel would not have taken such an extreme approach to correspondence, I firmly believe that there would have been less hostility between the parties. Based on the foregoing reasons, Mr. Cortese's billable hours will be reduced by 3.20 hours for his excessive approach to litigation.

Unnecessary Work

The Employer's final objections surround various entries which it deems to be unnecessary and irrelevant to the benefit of Claimant's case. For instance, IMC objects to the inordinate amount of time researching medical issues to the point where Counsel is trying to become an expert in every medical field addressed in this case. Specifically, the Employer first objects to the paralegal's research on survivor's benefits that took place on December 19 and 20, 2001. The Employer asserts that, since survivor's benefits were never and issue, the paralegal's research was unnecessary and should be disregarded. In response, Claimant's counsel advises that the research on survivor's benefits was critical to Claimant's wife, and is critical to a permanent, total disability claim since the permanent, total disability case is very relevant to benefits the survivor may receive.

As stated before, the proper test for determining if the attorney's work is necessary is whether at the time the attorney performs the work in question, the attorney could reasonably regard the

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.80 hours on March 26, 2002 for two letters to opposing counsel; 1.9 hours on April 22, 2002 for five letters to opposing counsel; .90 hours on April 24, 2002 for three letters to opposing counsel; and 1.1 hours on May 14, 2002 for three letters to opposing counsel.

work as necessary to establish entitlement. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981); ***Cherry v. Newport News Shipbuilding & Dry Dock Co.,*** 8 BRBS 857 (1978). Counsel's paralegal researched survivor's benefits on December 19 and 20, 2001. While it is true that the Claimant underwent surgery the week before, Mr. Shannon was very much alive at the time the research was performed. And as a result, Ms. Shannon did not have a claim for survivor's benefits at the time the research was performed. As critical to his case as Mr. Cortese wants to think, having his paralegal research survivor's benefits while Claimant was still alive is the ultimate example of putting the cart before the horse. For these reasons, Ms. Condrey's billable hours will be reduced by 1.0 hours.

Additionally, IMC argues that the paralegal is not qualified to write a demand. IMC contends that such a practice is commonly performed by attorneys, and absent evidence showing otherwise, the paralegal's time for performing such work on December 19, 2001 should be disregarded. Claimant's counsel failed to offer any evidence as to this or a counter argument in his reply.

Work by a law clerk, paralegal, or lay person may be recoverable, but only if performed "in aid of or in association with the supervising attorney on the claim." ***Todd Shipyards Corp. v. Director, OWCP,*** 545 F.2d 1176 (9th Cir. 1976). Undoubtedly, the paralegal's work with regard to Claimant's demand was performed in aid of Claimant's case. And while it would seem to be uncommon for a paralegal to undertake the work of drafting a demand, it is the Counsel's decision as to whom in his office he wants to perform such work. If Mr. Cortese is comfortable with having his paralegal draft the Claimant's demand, it is a choice that I (and the Employer's Counsel) must adhere to. Therefore, I find the time spent reviewing and revising Claimant's demand by paralegal to be compensable.

IMC next objects to the time spent by Mr. Cortese working on various motions which the Employer deems to be unnecessary and meritless. The Employer first objects to work performed with regard to Claimant's first Motion for Protective Order, submitted by Mr. Cortese on March 19, 2002. Therein, Claimant requested a protective order excusing Mr. Shannon from attending the neuropsychiatric testing on March 20-22, 2002. Counsel for the Employer argues that the filing of this motion by Claimant's Counsel was unnecessary since his client agreed to accommodate Claimant's examination requests – even ensured that Mr. Shannon would not be enforced to submit to an exam for more than an hour or one and one-half hours for any examination, at any given time, and Claimant will be able to stretch the series of neuropsychiatric examinations over a course of several days, if not weeks or months. On the other hand and in his motion, Claimant's counsel submits that the activities of the Employer/Carrier have been an unsympathetic combination of delay and harassment at every step. Moreover, Claimant's counsel further argues that, if the neuropsychological testing had been authorized when prescribed, Claimant would have had no problem undergoing the tests then.

A telephone hearing was held on March 27, 2002 wherein Claimant's Motion for Protective Order was denied in part, limiting the length of Claimant's examination to one (1) hour. Essentially, the restrictions ordered by me at the March 27th hearing were similar, if not the same,

to what the Employer was offering during the time leading up to the scheduled. Thus, Claimant's Motion for Protective Order was nothing more than a public airing of Mr. Cortese's disagreements with the way the Employer was defending its case. While Claimant's counsel is under the impression that such motion was necessary to establish entitlement for his client, it goes without saying that such would not have been the case if Mr. Cortese handled this issue in a professional manner. At the time Mr. Cortese filed the motion, the Employer was well aware of Claimant's condition and was more than willing to cooperate with the opposing party on such matter. For these reasons, I find the work done in connection with Claimant's first Motion for Protective Order to be unnecessary. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981). Therefore, Mr. Cortese's billable hours shall reduced by 7.00 hours for his work surrounding Claimant's initial Motion for Protective Order.

IMC also objects to the time spent by Claimant's counsel with regard to his decision to take the deposition of the Adjuster. Specifically, the Employer argues that the adjuster's deposition was a complete waste of time and money and should not have been taken as she had no testimony relevant to any issues in the case. Claimant's counsel, on the other hand, contends that the deposition of the adjuster was reasonable and necessary to discovery, and it further supported the motion for summary judgment that precipitated acceptance of permanent, total disability. Additionally, Mr. Cortese argues that he was able to obtain documents and admissions at the deposition that he did not have before. Having denied Employer/Carrier's Motion for Protective Order and/or Motion to Quash Claimant's request to take the deposition of the Claims Adjuster, it would follow that the time spent by Mr. Cortese in relation to the adjuster's deposition was reasonable and necessary at the time it was performed. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981).
The Employer next objects to the time spent preparing Claimant's second Motion for Protective Order. In the motion filed on April 30, 2002, Claimant's Counsel requested a Protective Order requiring the Employer/Carrier to provide Claimant with at least ten (10) days written notice of any planned doctors' appointments, and to allow only one (1) hour follow-up deposition at 4:00 p.m. of Claimant when his wife is home. In support, Mr. Cortese contends that such motion was filed in order to allow Claimant's wife to attend Mr. Shannon's IME with Dr. Patterson, which opposing counsel would not confirm, and which Dr. Patterson refused to allow. IMC argues that the instant motion is another frivolous attempt to distract me with misleading allegations. The Employer contends that it has always, and will continue, to work with and through Claimant's counsel in selecting dates for depositions. The Employer further contends that Counsel has not, because he cannot, pointed to a specific time where Employer has ever provided less than ten (10) days notice for a scheduled deposition. Additionally, Counsel for the Employer advises that Mr. Cortese faxed him a copy of the motion, requesting said written notice and advised that, if he did not respond in writing, he would be forced to file the Motion for Protective Order that day, and ask that it be heard the following day with other pending motions. According to Mr. Cruse, he faxed a confirmation to Counsel that Claimant's wife could attend the medical examination, and thereafter, Counsel, on May 7, 2002, withdrew his request, stating that the issue was moot.

The reasoning behind the Claimant's April 30th Motion for Protective Order is in line with

Counsel's first Motion for Protective Order. Once again, Mr. Cortese's bullish method of lawyering resulted in him having to file another unnecessary and baseless motion. In its response, IMC correctly points out that, if it has been so unreasonable in the scheduling of appointments, then why couldn't Mr. Cortese offer a specific instance in which Claimant was given less than ten (10) days notice for an appointment. I think it's safe to say that, if a lack of notice would have occurred, Mr. Cortese would have made it known to the Court and included such information in his motion. Mr. Cortese is correct when he asserts that such motion accomplished its goal. However, I find it hard to believe such tactics were necessary to achieve the outcome wherein Mrs. Shannon would be allowed to attend Claimant's IME. For these reasons, I find the work done in connection with Claimant's second Motion for Protective Order to be unnecessary. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981). Therefore, Mr. Cortese's billable hours shall reduced by 1.30 hours for his work surrounding Claimant's Motion for Protective Order, filed on April 30, 2002.

The Employer next objects to the work associated with Claimant's Motion for Summary Judgment, Sanctions and/or in Limine. In the Motion for Summary Judgment, Claimant's Counsel argues that summary judgment is appropriate on the issue of permanent, total disability since the Employer/Carrier has provided no evidence of suitable alternative employment, thereby failing to carry its burden or proof. The Employer, on the other hand, asserts that the Motion for Summary Judgment is baseless because what the Claimant's Counsel sought to do – have the Court recognize that IMC did not offer suitable alternative employment, thereby establishing that Claimant was totally disabled and shifting the burden of proof to the employer to show suitable alternate employment – is accomplished as a matter of law. In response, Claimant's Counsel asserts that the motion was reasonable and necessary to reduce the issues at the final hearing. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981).

The purpose of this [summary judgment] rule, requiring adverse party to motion for summary judgment to set forth specific facts showing that there is genuine issue for trial is to strengthen use of summary judgment as means to eliminate sham issues of fact and to avoid otherwise lengthy trials. ***U.S. v. Gossett,*** 416 F.2d 565 (C.A. Cal. 1969), *cert. denied* 90 S.Ct. 992, 397 U.S. 961 (1970). The object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what it genuine and substantial, so that only the latter may subject a suitor to burden of trial. ***Reed Research, Inc. v. Schumer Co.,*** 243 F.2d 602 (C.A. D.C. 1957).

In an attempt to reduce the issues to be contested at formal hearing, Claimant's Counsel properly filed a Motion for Summary Judgment in relation to the issue of permanent, total disability on May 1, 2002. While the Employer correctly points out that the burden of proof, with respect to total disability, shifts as a matter of law, IMC fails to recognize the fact that Claimant's Counsel was merely trying to eliminate an important issue of contention through the procedural tool of summary judgment. As it evolved, Mr. Cortese was successful when Counsel for the Employer notified me, by letter dated May 16, 2002, that it was accepting Mr. Shannon as permanently and totally disabled. Therefore, the time spent by Mr. Cortese in relation to the Claimant's Motion for

Summary Judgment was reasonable and necessary at the time it was performed. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981).

The Employer's final objections are with regard to the work surrounding Claimant's various motions to exclude the medical evidence – deposition testimony and report – of Dr. Saunders. IMC argues that the time spent by Mr. Cortese in trying to keep out Dr. Saunders' medical opinion should be denied since Counsel's request was denied on the morning of trial, with the Court accepting the transcript of Dr. Saunders deposition testimony with very little discussion on the issue. In response, Claimant's Counsel asserts that, although Dr. Saunders' testimony was admitted, objection was preserved, and at trial and in the post-trial memorandum, opposing counsel does not mention or rely on Dr. Saunders' testimony; therefore, the motions obviously helped to neutralize his testing.

According to my tally, Claimant's Counsel filed three (3) separate motions with respect to the medical opinion of Dr. Saunders. Initially, Mr. Cortese argues that Claimant's prescription for neuropsychological treatment was given on August 17, 2000, and for the Employer/Carrier to wait until February, 2002 to schedule the testing and then argue that it is urgent is disingenuous. Additionally, Mr. Cortese offers that there is no reason to delay final hearing or to admit evidence of neuropsychological testing at final hearing since the issue has been withdrawn by Claimant. Lastly, Mr. Cortese states that the testing is not relevant to the issues at hand because Employer/Carrier delayed in scheduling it for over 18 months until it now presents a health risk for Claimant to undergo.

According to 29 C.F.R. § 18.14, parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the proceeding. If IMC wants to pursue neuropsychological testing to determine the cause of Mr. Shannon's sudden weakness and falling episodes, it is free to do so under the Regulations' Scope of Discovery at 29 C.F.R. § 18.14.

There might be some truth to Mr. Cortese's notion that these motions helped to neutralize Dr. Saunders testing. By filing such baseless and unnecessary motions, Mr. Cortese was a nuisance to everyone involved, which may have neutralized the testing. Additionally, while Claimant's Counsel is free to withdraw issues, as he apparently did here, he cannot dictate how the Employer/Carrier is to make its defense. Therefore, Claimant's continuous objections to the admission of medical evidence from Dr. Saunders were unnecessary and frivolous. ***Cabral v. General Dynamics Corp.,*** 13 BRBS 97 (1981). Thus, Mr. Cortese's billable hours shall reduced by 8.30 hours for his work surrounding the various motions attempting to exclude Dr. Saunders' medical opinion from being admitted into evidence.

Time Spent Defending Fee Petition

Claimant's Counsel, in its Reply in Defense of Fee Petition, requests an additional 6.60 billable hours for time spent defending Claimant's Fee Petition. Mr. Cortese correctly points to ***Byrum v. Newport News,*** where the Board held that the Claimant's attorney may be awarded fees for time spent defending the fee petition. ***Byrum v. Newport News Shipbuilding & Dry Dock Co.,*** 14 BRBS 833 (1982); ***Jarrell v. Newport News Shipbuilding & Dry Dock Co.,*** 14 BRBS 883

(1982); ***Morris v. California Stevedore & Ballast Co.,*** 10 BRBS 375 (1979). As such, the 6.60 hours spent defending Claimant's Fee Petition are deemed compensable services.

Additional Charges

Lastly, Claimant requests $477.53 in additional charges for photocopying costs and postage. As stated above, traditional clerical duties are not properly compensable and must be included as part of overhead in setting the hourly rate. These unreimbursable expenses include local telephone calls, photocopying, postage, and typing. ***Pritt v. Director, OWCP,*** 9 B.L.R. 1-159 (1986); ***Marcum v. Director, OWCP,*** 2 B.L.R. 1-894 (1980). Therefore, the fee shall be reduced by a further $477.53.

CONCLUSION

In summary, the following items in Mr. Cortese's fee petition are denied:

(1) 20.50 hours spent by the paralegal for clerical work;
(2) 10.00 hours for the paralegal's daily individual activities which were clumped together into one (1) large daily entry;
(3) .35 hours for the paralegal's excessive time for drafting/reviewing routine correspondence;
(4) 2.95 hours for the paralegal's duplicate entries;
(5) 1.00 hours for the paralegal's unnecessary research;
(6) 1.90 hours for Mr. Cortese's excessive time for drafting/reviewing routine correspondence;
(7) .30 hours for Mr. Cortese's duplicate entries;
(8) 3.20 hours for Mr. Cortese's excessive practice of sending multiple letters to opposing counsel on given dates;
(9) 16.60 hours for Mr. Cortese's unnecessary motion practice, specifically his continuous filing of Motions for Protective Order and Motions in Limine; and
(10) $477.53 in additional costs for photocopying and postage.

Accordingly, after taking into account the quality of the representation provided, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, and the level at which the representatives entered the proceedings, a fee of **$16,992.50,** representing 122.60 billable hours at a rate of **$125.00** per hour and 33.35 billable hours at a rate of **$50.00** per hour, is reasonably commensurate with the work done before the Office of Administrative Law Judges and necessary for successful prosecution of this claim. Claimant also seeks recovery of expenses totaling **$5,928.35.** I find these expenses to be reasonable.

ORDER

BASED UPON THE FOREGOING Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order.

1. The Employer, **IMC Agrico MP Inc.,** and its Carrier, **Travelers Insurance Company,** shall pay all continuing appropriate, reasonable and necessary medical care and treatment resulting from Claimant's work injuries under § 7 of the Act, including

   A. A back brace;
   B. An abdominal binder; and
   C. Family/marital counseling

   for the Claimant, Larry L. Shannon, and his wife, Lila Shannon.

2. Commencing on June 5, 2001, and continuing thereafter until further ORDER of this Court, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of eight hundred seventeen and twenty five hundreds dollars ($817.25), such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant for the same time periods specified above as a result of his June 5, 2001 injury.

4. The District Director shall make all calculations necessary to carry out this order.

5. The Employer/Carrier shall pay Claimant's attorney, Anthony V. Cortese, the sum of **$22,920.85** for services rendered to and costs incurred by the Claimant, Larry L. Shannon.

SO ORDERED.

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Daniel F. Solomon
Administrative Law Judge